Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

vs.

WILLIAM B. RICKS, M.D., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(A Due Process Case)

Fair medical peer review is protected by the Health Care Quality Improvement Act of 1986 (HCQIA) 42 U.S.C. § 11111, *et seq.* This statute's standards for qualified immunity from antitrust suit if there is "fair," "reasonable," and "adequate" conduct of peer review proceedings have never been interpreted by the United State Supreme Court. This statute does not define these terms. Before HCQIA's enactment, such proceedings were governed by common-law standards of "fair procedure" and by industry guides based on published cases. The legislative history and § 11114 suggest that Congress intended to preserve these long-established common-law rights of fair procedure.

There is a conflict between the Ninth and Eleventh Circuits in the interpretation of this statute's procedural requirements for the qualified immunity it confers.

The case at bench is a physician's anti-trust suit. Summary judgment was granted by the District Court based entirely upon the anti-trust immunity of 42 U.S.C. § 11111, *et seq.* Obviously unfair peer review has been given HCQIA's *qualified* immunity. Petitioner contends that the peer review procedures followed in the case were not "fair," "reasonable," nor "adequate" within the meaning of the statute.

Petitioner documented below over a dozen breaches of rights long developed by common law, industry guidelines, and industry practices. The Ninth Circuit dismissed this common-law background as "irrelevant" to its determination whether respondents met the standards for fair peer review procedure established by this new statute, and sanctioned petitioner's counsel for raising this issue without affording him a hearing.

The following questions are presented:

1. What are the minimum standards of fair conduct in a medical peer review proceeding to earn qualified immunity under the HCQIA?

2. Does a reviewer's unfair conduct of a peer review proceeding support an inference of bad faith and disqualify the reviewer from statutory immunity?

3. Where respondent reviewers move for summary judgment "on the exclusive issue" of HCQIA immunity under the rebuttable presumption of 42 U.S.C. § 11112 (a), what standard is applied to the responding party's rebuttal evidence?

The Ninth and Eleventh Circuits are in conflict on this issue. *Bryan v. Holmes Regional Med. Center,* 33 F.3d 1318, 1333 (11th Cir. 1994) provides this test: "Might a reasonable jury ... conclude [plaintiff] has shown by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)" (quoting *Austin v. McNamara,* 979 F.2d 728, 734). In *Smith* at 1485 the "inquiry focuses on whether [plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed their action was warranted by the facts."[1] *Smith* chops off the inquiry at the "reasonable belief" point, while *Bryan* includes the three additional statutory points presented by Congress in § 11112(a), sub. 2: "reasonable efforts to obtain the facts," § 11112(a), sub. 3: "adequate notice and hearing procedure," and § 11112(a), sub. 4 "reasonable belief" after a reasonable effort to obtain the facts and a proper hearing.[2]

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1. Appendix A at 13a.

2. Appendix at 57a.

4. Was the case "frivolous" within the meaning of 42 U.S.C. § 11113 where months after the entry of summary judgment on the statutory immunity issue, the district court, without requesting briefing by the parties, *sua sponte* required "direct evidence" of a conspiracy as fundamental to establish petitioner's Sherman Act case, made a finding that petitioner's case was "frivolous" because he had not presented such evidence, and based its § 11113 fee shifting order of over $300,000 on said finding?

5. Did the District Court's *in camera* assessment of the legal fee application based on "attorney re-cap" instead of original records (which original records were available and subpoenaed by Dr. Smith) violate Federal Rules of Evidence, Rule 1006?

6. Were the requirements of Federal Rules of Appellate Procedure, Rule 38 and due process satisfied by assessing a $137,500 sanction against petitioner's attorney without notice and a hearing for arguing that the court in interpreting the new statute's requirement for "fair," "adequate" and "reasonable" procedure in peer review hearings and private administrative appeals (which terms are undefined by the statute) consider "fair procedure" guidelines such as those issued by committees of the American Bar Association, the American Hospital Association and other similar organizations experienced in physician peer review, published case law, and state legislation? Should there be neutral review of big sanctions?

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OPINIONS BELOW

Opinions and Orders below are appended along with a catalog of Unfair Acts and significant text of HCQIA. The Appendix and its contents are as follows: Appendix A — *Smith v. Ricks*, 31 F.3d 1478 (9th Cir. 1994); Appendix B — Ninth Circuit Order (unpublished) of October 4, 1994, (Request for Ninth Circuit General Order 10.9 sanction procedure denied); Appendix C — Ninth Circuit Order (unpublished) of November 17, 1994 (rejecting petition for rehearing of request for General Order 10.9 proceedings); Appendix D — *Smith v. Ricks*, 798 F. Supp. 605 (N.D. Cal. July 15, 1992) (Summary Judgment granted); Appendix E — District Court Order (unpublished) of October 6, 1992, (Fee Shift pursuant to § 11113 for "frivolous" case); Appendix F — Unfair Peer Review Acts, a catalog with E.R. references; G — Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111, *et seq.* (significant portions); H — Separate Appendix, Weissberg and Aronson's newsletter.

STATEMENT OF JURISDICTION

An order denying rehearing of the Ninth Circuit Court of Appeals opinion was signed October 4, 1994 and filed October 5, 1994. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(i).

STATUTES INVOLVED

Significant portions of 42 U.S.C. § 11111, *et seq.* appear in Appendix G at 57a-61a.

STATEMENT OF THE CASE

A. Physician's Antitrust Suit

This is a physician's anti-trust suit against his competitors and others who control the hospital peer review process and

misused it (in a long list of hostile acts cataloged in Appendix F) to expel him from the medical staff of Good Samaritan Hospital (GSH) in San Jose, California. Dr. Smith's suit claims peer review was abused for anti-competitive purposes. Also sued are trustees — ten out of 15 of whom refused to step aside despite a recorded *voir dire* in which they admitted business or professional connections to the accusers. These trustees voted to set aside the decision of a "jury" (Judicial Review Committee [JRC]) of doctors on the medical staff who heard all the evidence and decided to keep Dr. Smith on the medical staff.

B. Rule 56 Motion — Sole Issue: HCQIA Immunity

Respondents moved for summary judgment, contending that they were immune from suit based upon 42 U.S.C. § 11112. In opposition to this motion Dr. Smith provided evidence of a dozen wrongful acts by respondents[3] compared to industry practices.

Summary judgment was granted early in the case on the narrow issue of qualified HCQIA immunity only (798 F. Supp. 506, Appendix D). Discovery was incomplete at the time judgment was entered. The magistrate's order for document production by respondents had not been complied with, and no depositions had been taken.

C. The Post-Judgment Fee Shift Under 42 U.S.C. § 11113

Two months after the summary judgment was appealed, respondents moved for a shift of attorney fees under 42 U.S.C. § 11113. Although the Sherman Act anti-trust issues had not been addressed by any of respondents' motions, the district court *sua sponte* ruled the case was frivolous for failure to produce "direct evidence" of conspiracy, and shifted the respondents' legal fees

3. *Compare Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988) at note 3 condemning conduct which was "shabby, unprincipled, and unprofessional."

and costs onto petitioner. (*See* unpublished fee shifting order, Appendix E at 47a.) The district court did not request briefing on the issue of need for "direct evidence."[4]

D. The Sanction on Appeal

Dr. Smith's attorney was publicly castigated for the appeal:

> But if anyone is truly at fault in pursuing this *meritless claim*, it is Dr. Smith's counsel, Jerome Berg. He should have known his *legal arguments were clearly frivolous*. Instead of recognizing his misconduct when the district court imposed sanctions, Mr. Berg pressed on. *Mr. Berg argued this court should apply various state law decisions and professional guidelines in place of the text of the HCQIA*. [Emphasis added, *Smith v. Ricks*, 31 F.3d at page 1489.]

The sanction should be vacated on both due process and substantive grounds. First, that criticism was not preceded by any notice except respondent's non-specific request for fees on appeal. Second, Dr. Smith's lawyer did not argue that the court should ignore the text of HCQIA. Rather, Dr. Smith contended that its undefined terms "fair," "reasonable" and "adequate" should be interpreted in light of previous common law, industry practices, and professional guidelines especially since the Secretary of HHS declined the invitation of Congress to write guidelines (§ 11114, Appendix G at 61a). The legislative history and § 11114 show that Congress was aware of this common law background and recognized that HCQIA'S procedures were

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4. *See* Sherman Act analysis in *Bolt v. Halifax Hosp., etc,*. 891 F.2d 810, 819 (11th Cir.1990); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989), *aff'd*, 500 U.S. 322, 111 S. Ct. 1842 (1991); and *Islami v. Covenant Med. Center*, 822 F. Supp. 1361 (N.D. Iowa 1992).

incomplete. Third, imposition of this sanction violated due process and the Ninth Circuit's General Order No. 10.9 requiring notice and an opportunity to respond.

E. *Smith's* Impact

The largest West Coast law firm defending suits of this type is Weissburg & Aronson. Their August 23, 1994 newsletter analyzes *Smith* in a box on the front page:[5]

> **Impact:** The decision is important for peer reviewers, because it upholds HCQIA's immunities against a series of *alleged procedural defects that are commonly raised by physicians* in state court peer review lawsuits, but which have not been ruled on by any federal appellate court interpreting HCQIA. The attorneys' fee award may also deter similar frivolous suits in the future. [Emphasis added.]

The only HCQIA case in which such a fee shift was previously ordered is the unpublished case of *Wei v. Bodner,* 92 WL 165860 (referred to by the district court) (Appendix E at 46a) where plaintiff made no effort to contest the § 11112 claim to immunity. By contrast, Dr. Smith has shown respondents engaged in a long series of unfair peer review acts which are at odds with the customary fair procedure practices of the industry.

F. Only *Smith* Addresses Mechanics of Fair Procedure

Smith is still the only action under HCQIA which addresses in detail the procedural mechanics of what shall be the acceptable standard of "reasonable efforts to obtain the facts" and what are "adequate" hearing and appeal procedures in the private

5. This newsletter is separately appended as Appendix H.

administrative process at the 7,000 hospitals in America. For this reason, even if Dr. Smith must lose, it was not frivolous to initiate and pursue this case.

G. Statement of Facts

(i) Thumbnail History; Competitors Attack Dr. Smith's Practice

Dr. Smith is a young, very capable, hard-working internist and cardiologist. He began his practice in San Jose, California at O'Connor Hospital but he left after anti-competitive doctors refused to renew his practice rights. They faulted him on four very complex internal medicine cases and reported him to the state medical board in an effort to cripple his career.

Dr. Smith moved his practice to GSH in the early 1980's. He was building a big internal medicine and cardiology practice in his six years on the GSH medical staff (probably the single busiest doctor) when senior competitors who controlled the medical staff membership mechanism began to harass him through challenges before the departmental committees they control. (One way they control peer review is by not sharing review duties with all members of the department.)[6] Dr. Smith refuted most of the charges at committee level, and he was "re-appointed" to the staff April 18, 1988 although all of the prior GSH accusations and adverse evaluations of his old O'Connor Hospital cases were known. (This fact is acknowledged in the opinion, Appendix A at 6a.)[7]

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6. Appendix F at 50a, item 1(a).

7. The opinion unfairly relied on criticisms of the stale O'Connor cases by doctors whose *curricula vitae* were never provided, but whose criticisms were not respected enough by the Medical Board of California (formerly Board of Medical Quality Assurance) to warrant a licensing citation. The medical staff reappointment of Dr. Smith by his competitors should be adequate proof that those critics got no respect at GSH either. Those criticisms were not presented at the JRC or the appeal to the Trustees.

At a heart catheterization (about his 500th without a death) patient L.W. died on April 8, 1988.[8] A nurse eyewitness made a contemporaneous standard "notification form" report of the death, but a week or so later, after discussions with respondent Dr. Nagel, she made a new report. Shortly thereafter, formal charges were initiated based on the old accusations and the new death report of this nurse. *The nurse's original death report has been suppressed to this day!* Respondents withheld it from all the pre-hearing review committees frustrating a "reasonable effort to obtain all the facts" (§ 11112(a)(2)). Respondents admitted possessing this report, but claimed it is protected by the litigation privilege. Also suppressed in the review process was a "no negligence" peer review letter about the L.W. death from a cardiologist at Baylor University.

A hearing was held before a panel of doctors (a Judicial Review Committee, or "JRC") at which Dr. Nagel's cousin (respondent Keith Bartel, Esq.) was the legal advisor provided to the JRC by respondents. Mr. Bartel participated in the JRC's deliberations, instructed them in the law, ruled on admissibility of evidence at the hearing, prevented *voir dire* of business connections between the JRC and the accusers, and drafted the decision. (*See* 798 F. Supp. 608, Claim No. 6, Appendix A at 34a.)

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8. This death occurred 10 days *before* the re-appointment, and a jury could believe it also was known because defendant Dr. Nagel runs the cath lab where it occurred, and he was present at the time of death. The JRC found, "of the hundreds of cardiac catheterization cases performed by Dr. Smith at [GSH this] was the only catheterization case in which Dr. Smith's judgment, management and technique were criticized and proved." *Compare* the unsupported contrary finding by defendants noted by the district court at 798 F. Supp. 607, Appendix A, page 30a. The only JRC evidence against Dr. Smith came from his competitors. No independent outside review was made, and two items of evidence in the L.W. death case were suppressed: the original incident report by the nurse eyewitness and an evaluation solicited by Dr. Smith from Dr. Fletcher. (*See* Appendix F, page 51a, items C and E, page 51a, item C, and page 54a, item E.)

Mr. Bartel specifically ruled that the eyewitness nurse's first report was not admissible evidence at the JRC hearing.

After the JRC decided to retain Dr. Smith on the staff respondent competitors appealed to the hospital's trustees who expelled Dr. Smith. (798 F. Supp. 608)

Dr. Smith took his practice to nearby Mission Oaks Hospital where he soon had more cases than any other doctor (by far) and no complaints about his patient care. The business organization respondents bought Mission Oaks Hospital, and they consolidated the medical staffs. As the competitor-dominated GSH medical staff organizations from which Dr. Smith had been recently expelled now controlled Mission Oaks Hospital as well, Dr. Smith moved his practice to another hospital, but like Mission Oaks, it has no heart catheterization facility.

(ii) Opposition to the Summary Judgment Motion (Defects in the Peer Review, JRC Hearing, and Appeal to the Trustees)

Respondents moved for summary judgment on the declaration of a hospital secretary that peer review was done together with the hospital administrative record.

In opposition to the summary judgment motion Dr. Smith produced the declaration of Jerome Lackner, M.D., former Secretary of the California Department of Health. The Lackner declaration provides the standard for good faith peer review and explains its importance to the goal of continuous improvement of "quality health care" (a central concept of HCQIA, *see* § 11112(a)) Dr. Lackner states that failure to produce data in which the doctors are ranked on a performance basis suggests that if the information were produced it would prove Dr. Smith was being treated unfairly. (E.R. 264). The magistrate judge made a discovery order for that type of information, but none of it has

ever been produced. Dr. Smith also presented declarations of Jerome Berg, Esq., an eyewitness to the process as well as an expert in physician staff rights cases which demonstrate numerous violations from "quality health care" and due process standard practices of the industry. Peer review guides produced by health industry professionals in the American Bar Association, the American Hospital Association, and other similar organizations were introduced through a Berg declaration. (*See* 31 F.3d at 1487 footnote 8, Appendix A at 16a finding these guidelines "irrelevant.")[9] But that ruling overlooked the intention of Congress to augment the fair procedure elements of HCQIA through subsequent administrative guidelines after consultation with the industry. (*See* § 11114 at Appendix A at 61a.)

Also submitted in opposition to the summary judgment motion Dr. Smith provided the JRC testimony of America's leading academic cardiologist, the late Melvin Marcus, M.D. Dr. Marcus found no negligence in the L.W. catheterization lab death, and he criticized a host of untoward cath lab results of respondents (which corroborates the inference that respondents practice a double standard and unfairly attacked Dr. Smith). Also, Dr. Smith provided an evaluation of the L.W. death ("no negligence") by a Baylor University cardiologist, Dr. Fletcher (which surfaced in the discovery process of this case after Dr. Smith filed suit). The Fletcher report had been suppressed during the review and JRC by respondents and their lawyers.

Respondents submitted no percipient witness declaration of facts; no expert declaration justifying their obviously unfair review, hearing, and appeal; and no expert declarations which criticize Dr. Smith's patient care.

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9. Appendix F is a catalog of the unfair acts practices in violation of those guidelines during the peer review which Dr. Smith submitted to rebut respondents' summary judgment claim to the HCQIA presumption of fair procedure.

(iii) Use of Expert Witness Declarations to Exhibit Industry Practices Was Appropriate Advocacy

Before *Smith, Austin v. McNamara* (979 F.2d 728 (9th Cir. 1992)) and *Islami* (*supra*) were the only judicial opinions regarding the adequate procedure standards of HCQIA. *Smith* now presents a very detailed well-documented history of numerous due process violations compared to hearing protocols of an American Bar Association Committee of health industry lawyers, the Peer Review Immunity Task Group of the American Academy of Hospital Attorneys of the American Hospital Association,[10] the California Medical Association, and California Business and Professions Code § 809, as well as case law in the hospital staff membership field.

REASONS FOR GRANTING THE WRIT

I. TERMS OF HCQIA IMMUNITY

A. Issues Presented by In-Hospital "Peer Review"

Private in-hospital "peer review" requires a balancing of interests. The public has an interest in the quality of medical services. However, "peer review" of a physician's performance, in which his professional livelihood is at stake, is normally conducted by other physicians in practice at the same hospital — *i.e.*, by the accused physician's competitors who can abuse peer review to hide their own malpractices while expelling competitors without objective outside review. Prior to the passage of the HCQIA, the courts fashioned rules of "fair procedure" for in-hospital proceedings to balance these interests.

The threshold issue is whether respondents met the minimum standards of fair conduct. Petitioner proved a baker's

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10. Parts of which are quoted in footnote 14 below.

dozen violations of fair proceedings (Appendix F). Over his objections, respondent peer reviewers refused to follow fair practices.

B. The Immunity Standards of HCQIA

HCQIA's immunity standards are set forth in §11112 (Appendix G). 42 § 11112(a)) provides general standards. Immunity from anti-trust litigation is conferred if those who acted:

1. Held reasonable belief the action was in the furtherance of quality health care,

2. Made a reasonable effort to obtain the facts,

3. Provided adequate notice and hearing procedures or others as are fair to the physician, and

4. Possessed a reasonable belief the action was warranted by the facts known after (2) and (3).

Section 11112(a) concludes with a rebuttable presumption that these standards were met "unless the presumption is rebutted by a preponderance of the evidence."[11] This burden is no more than the petitioner's burden of proof in all civil cases.

The U.S. House of Representatives Committee on Energy and Commerce, which wrote HCQIA, expressed its measure for assessing the bona fides of the review. The committee's report appears to require a neutral and generous physician-sparing review, not a mean-spirited anti-competitive prosecution:

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11. HCQIA's "preponderance of the evidence" burden on plaintiff is not as heavy as an earlier draft which required "clear and convincing" evidence to overcome the presumption of compliance with the four standards (*see* H.R. Rep. No. 903, 99th Cong. 2d Sess. 3 (1986) at page 10).

> • "In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices." (House Report P.L. 99 - 660, page 6393).
>
> • "... even a legitimate malpractice claim does not automatically mean that a practitioner deserves disciplinary action. Any practitioner — even the most skilled and careful — can make an occasional mistake." (*Op. cit.* 6396, mid-page).

During the 1986 debate Representative Waxman expressed Congress' desire to grant immunity to fair peer review but not to monopolistic abuse in these words addressed to the Ninth Circuit Court of Appeals ruling in *Patrick v. Burget,* 800 F.2d 1498 (1986):[12] "Bad faith peer review activities permitted by the *Patrick* case could never obtain immunity under [HCQIA]." (Congressional Record October 17,1986, daily edition H11590 at the foot of the first column).

Another guide to interpretation of HCQIA's § 11112(a) "reasonable effort to obtain the facts" and "reasonable belief the action was in furtherance of quality health care" based on those efforts is the *American College of Physicians Ethics Manual* ,117 *Annals of Internal Medicine* 947 at 956 (1992):

> [I]n the absence of substantial evidence of professional misconduct, negligence, or incompetence, it is unethical to use the peer review process to exclude another physician from practice, to restrict clinical privileges, or to otherwise harm the physician's practice.

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12. *Reversed,* 486 U.S. 94,108 S. Ct. 1658 (1988).

C. The Presumption of an Adequate Hearing. Did Respondents Do Enough to Qualify?

The second procedure section of HCQIA (§ 11112(b)[13] addresses the hearing process and supplies an unrebuttable presumption that the hearing is adequate if certain provisions are met. Those provisions in condensed form (not an exact quote) as to the relevant issues §11112(b)(3) provide:

> [T]he . . . entity is deemed to have met the adequate notice and hearing requirement if, as to the hearing, the entity appoints a hearing officer not in direct competition with the physician or a panel of individuals not in direct competition. The physician has the right to be represented by an attorney, have a record made of the proceedings, call, examine and cross-examine witnesses, and present evidence.

The appellate opinion claims that respondents conducted the JRC hearing by a method "so close" to the § 11112(b)(3) "conduct of hearing" list that "no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate." 31 F.3d at 1487 (Appendix A at 16a).

Dr. Smith disagrees, and contends the evidence establishes that respondents did not do all that is necessary entitle them to § 11112(b)'s irrebuttable presumption of an adequate hearing.

The cousin of one respondent was appointed as law officer of the hearing committee. He made rulings suppressing a written eyewitness account of the main case against Dr. Smith and refused to make a record of his guidance of the committee. Neither the Court of Appeals' opinion 31 F.3d 1486 (Appendix A at 15a-16a) nor the district court's opinion 798 Fed. Supp. 605

13. Appendix G at 59a-60a.

address these two points, nor most of the other unfair acts which appear in the record (Appendix F). Here is Dr. Smith's specific list of defects in the JRC hearing process which prevent a finding that § 11112(b) can be "deemed" to have been satisfied:

1. Dr. Smith contends that "representation" by a lawyer cannot occur if the lawyer is not allowed to speak and act as lawyers customarily do when "representing" a client.[14] (*See* Appendix F at 53a and 55a for a review of the JRC defects in which a speaking lawyer would have been helpful in making a

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14. The opinion's reference at footnote 8 to the mute attorney in *Anton v. San Antonio Hospital,* 19 Cal. 3d 802, 827, 140 Cal. Rptr. 442, 456 (1977) is distinguishable. *Anton* interpreted a pre-HCQIA contract (the bylaws under which the hearing was conducted) which did not contain HCQIA's explicit "right to be represented by a lawyer." (*See* 19 Cal. 3d 828, 140 Cal.Rptr. 456-7). Justice Clark, in dissent, points out that "the majority, in effect, forces the physician to practice law." (19 Cal. 3d 834, 140 Cal. Rptr. 461). The Peer Review Immunity Task Group of the American Academy of Hospital Attorneys of the American Hospital Association guideline (E.R. 381) recommends these procedures to satisfy HCQIA (emphasis added):

> 1. *Right to an attorney's services*
>
> "*The attorney advising the hearing panel and the attorney representing the physician should be accorded reasonable latitude in cross-examination, but acrimony should not be allowed by the hearing panel.*"
>
> 2. *Permitting useful evidence*
>
> "*Substantial latitude should be permitted in the presentation of evidence, medical reference works and testimony,*" within reasonable time constraints and the discretion of the hearing panel.
>
> 3. *Testimony of a competitor*
>
> Physicians who are direct economic competitors of the physician involved may testify as witnesses, whether they are called by the physician or the hearing panel or the hospital, but "*a physician should not be deprived of his privileges solely on the basis of medical testimony by economic competitors.*"

clear record about *voir dire*, suppression of evidence, and more.)

2. Dr. Smith contends a "record" means a full record including all the "jury" instructions told to the hearing and appeals panels (such as how to assess witnesses, burden of proof, the consequence of suppressing evidence, false statements, weighing expert testimony by a competitor, inferences to be drawn from refusal to have an outside evaluation, the legal and procedural consequences of their decision, the legal effect of the language Mr. Bartel wrote for their decision, and the like). In connection with the stale O'Connor Hospital cases (which occurred more than six years before) did Mr. Bartel inform the physician jury that in *Wyatt v. Tahoe Forest Hospital Dist.*, 174 Cal. App. 2d 709, 714, 345 Pac. 2d 93, 96 (1989) the court held that a physician should not be denied practice rights for remote past conduct? The full record issue is also important under the facts of the streptokinase case because that case turns on a difference of opinion between the accusers and Dr. Smith, but Dr. Smith produced medical literature which supports his treatment while the accusers did not. In this connection *see Rosenblit v. Superior Court,* 131 Cal. App. 1434, 1447, 282 Cal. Rptr. 819, 827 (1991) which holds that the public has a right to a "variety of treatment options" and "diversity of opinion" of physicians. How did Mr. Bartel advise the JRC? There is no record.

3. Dr. Smith contends the § 11112(b) "right to call witnesses" and "present evidence" includes the right to evidence such as the nurse eyewitness's suppressed original report as well as the report she made a week or so later after Dr. Nagel counseled her, and Dr. Fletcher's report which the accusers' attorney, Mr. Campbell, had in his possession throughout the JRC but did not release. This right should also include some right of discovery as suggested by the industry guides and California Business and Professions Code § 809

especially of exculpating evidence held by the accuser. (*See* Calif. Bus. and Prof. Code § 809.2(d) and (e)(l) and (2).)

Dr. Smith contends that failure to satisfy these three elements drops the anchor outside § 11112(b)'s "safe harbor," and "so close" is not adequate to obtain the presumption of an adequate hearing.

If the opinion had listed all of Dr. Smith's criticisms of the process imposed on him the court below would have made it clear that it was approving as a matter of law procedures which do not produce a fair hearing. By omitting many obviously off-putting practices of the respondents the opinion projects a very difference case than the one Dr. Smith presented.

D. Absent Satisfaction of the Statutory Presumption of an Adequate Hearing Respondents, Can Be Attacked on a Wider Field of Due Process Violation Than § 11112(b) Provides.

If respondents' hearing process is not found to have docked in the "safe harbor" unrebuttable presumption of § 11112(a)(3) but was merely "so close," as the court found, the in-the-hospital procedures must meet the minimum test of § 11112(a)(3): "adequate procedure."[15]

Dr. Smith has demonstrated respondents missed the boat on fair practices in this case by listing all the obviously unfair things they did in Appendix F. A jury could easily find respondents failed to accord Dr. Smith "adequate procedure."

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15. For the sake of a minimal rights discussion assume that "adequate procedure" is written in the statute as an alternative to "or such procedures as are fair . . . ." This concession for purposes of the argument foregoes the reasonable interpretation that the statute's subordinate clause explains "adequate procedure." (*See* Appendix G at 57a).

E. Did Respondents Demonstrate the Other Mandatory Elements for § 11112(a) Immunity—Reasonable Belief That Their Action Furthered Quality Health Care and a Reasonable Effort to Obtain the Facts?

(i) Conflict of Circuits

Whether or not the hearing process arrived in the "safe harbor" of adequacy or was outside, but "so close," two other mandatory elements of the immunity expressed in § 11112(a) need to be examined, "reasonable belief the action was in the furtherance of quality health care" and "reasonable efforts to obtain the facts." The listed deficiencies (Appendix F) demonstrate that Dr. Smith provided a fact showing sufficient to rebut the rebuttable presumption of § 11112(a) that respondents did not make adequate efforts to get all the facts, and they could not have held a reasonable belief that what they did was in furtherance of quality health care. Here the Court of Appeals (at 1458, Appendix A at 13a) skipped most of the § 11112(a) conditions and only focused on "reasonable belief their action was warranted by the facts."[16] The Court of Appeals ignored the HCQIA's immunity requirements to make "reasonable efforts to obtain the facts" and to provide "adequate notice and hearing procedures." This oversight by the court places *Smith* in conflict with the Eleventh Circuit and other Ninth Circuit cases.The fundamental HCQIA issues raised by Dr. Smith were (1) that he had an unfair review made without a "reasonable effort to obtain the facts." He complains of suppressed reports, failure to engage the customary outside (objective) review relying instead on criticisms of his competitors, and (2) the hearing and appeal processes were not adequate, they were "a kangaroo court" (quoting the district court at 798 F. Supp. 611 at the foot of

16. Even here a jury could find that if defendants believed they had a good case against Dr. Smith they would not have needed all the unfair tricks they played.

column II). He concludes that these defects deprive respondents of HCQIA's qualified immunity.

II. DOES A MOTION FOR SUMMARY JUDGMENT UNDER § 11112(a) REQUIRE THE COURT TO WEIGH EVIDENCE ON ALL FOUR ELEMENTS FOR IMMUNITY?

The general rule on a motion for summary judgment is that the non-moving party is entitled to the benefit of all reasonable inferences his evidence supports. The court should not further weigh the evidence once the non-moving party has displayed specific facts which exceed a minimum adequate to support a jury verdict. (*See Matsushita, etc v. Zenith, etc.,* 475 U.S. 574, 587, and *Anderson v. Liberty Lobby,* 472 U.S. 242, 249-250 (1986).)

The Court of Appeals departed from this traditional Rule 56(e) analysis. Instead, the court united two elements from *Austin*: "the rebuttable presumption *creates a somewhat unusual standard of review*" (which refers to all the § 11112(a) provisions) with a more limiting subordinate quote from another part of *Austin* focused on only one element of § 11112(a). By not discussing the other three fair procedure statutory elements required for the immunity the court concludes, "Dr. Smith could not rebut that [§ 11112(a)] presumption." (Appendix A at 13a). Although Dr. Smith presented specific evidence that respondents did not conform to the standards of § 11112(a), the Court of Appeals without explanation did not list and evaluate this evidence. Instead, the court writes, "Dr. Smith raises a number of 'procedural defects,' but we reject his claims." (*See* 31 F.3d at 1478, Appendix A at 15a where only four defects are listed.) "Dr. Smith raised *numerous* other alleged defects" (at 1487, Appendix A at 16a, emphasis added), but none of the other defects (Appendix F) are listed in the opinion — not even the suppressed eyewitness report.

By departing from traditional Rule 56 analysis the Court of Appeals produced a result "demonstrably at odds with the intentions of [HCQIA's] drafters." *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250 (1982). HCQIA's descriptive caption "Chapter 117 Encouraging Good Faith Professional Review Activities" is not advanced when mean-spirited review and unfair procedures are approved by the court.

Dr. Smith contends that HCQIA § 11112(a)(3) requires analysis of two elements of the peer review: the hearing and appeal process and the investigative "quality of care" process. First, has the non-moving party produced evidence which could sustain a verdict that the hearing procedures were inadequate or unfair? *Austin* (*supra*) stands as an example of a hearing which was indisputably fair.

Here is a tabular comparison between the process given to Dr. Austin and the one given to Dr. Smith:

Provisions	Austin (731 F. Supp. 934)	Smith (*See* Appendix F)
Outside review	California Medical Association appointed outside doctors Tolchin and Shertz (936)	Refused
Hearing officer	Retired Appellate Justice Hon. William Reppy (937)	Accuser Nagel's cousin
Representation	By counsel (937 and 941)	Counsel muted
Record	"all the proceedings were recorded by court reporters" (941)	Instructions to hearing panels were not recorded

Provisions	Austin (731 F. Supp. 934)	Smith (*See* Appendix F)
Evidence	"all the evidence he desired" (941)	Suppressed nurse eyewitness' first report, and Dr. Fletcher's favorable review of the L.W. death case

Austin's summary judgment is appropriate. The district court reports that Dr. *Austin* "does not attempt to refute or contest any of respondents' efforts to apply the immunity elements of HCQIA to the facts of this case" (942).[17] By contrast, Dr. Smith's Rule 56(e) specific evidence of due process violations are swept under the rug by the August 11,1994 opinion.

Fobbs v. Holy Cross (St. Agnes Hospital), 789 Fed. Supp. 1054 (C.D. Cal. 1992) shows a pattern of fair procedure similar to the *Austin* procedure. A JRC hearing was held where *voir dire* was not allowed. After petitioner complained, the case was returned for a new JRC with *voir dire*. The *Fobbs* court held that "plaintiff had wrongly been denied the right to conduct *voir dire* of the JRC. . . ." Dr. Smith complains that his truncated *voir dire* of the JRC glossed over at 1483 (Appendix A at 8a) forbade learning about business and professional connections the accusers and the JRC. We later learned a JRC member is a patient of one respondent accuser. *Smith* asserts at 1486 (Appendix A at 16a) that HCQIA "does not require *voir dire*." Dr. Smith contends a biased "jury" defies HCQIA's fairness and reasonableness requirements. Respondent Nagel's cousin, Mr. Bartel, appointed and paid by respondents, prevented a proper *voir dire* and committed other unfair acts while acting as the legal

17. Austin did not complain about two biased tribunals, suppressed evidence, a muzzled lawyer, an upside-down burden of proof-or lack of a record — all serious deficiencies in Dr. Smith's JRC (Appendix F).

advisor to the JRC. On appeal to the Board of Directors there is a lengthy *voir dire*. (*See* Appendix F at 56a, item a.) Ten of the 15 directors who voted to reverse the JRC were connected to the accusers by business or professional ties, but they refused to step aside.

The second level of analysis focuses on the § 11112(a) issues of reasonable belief and reasonable efforts to gather the facts. Dr. Smith is entitled to the inference expressed in *Harris v. Bellin Memorial Hospital,* 13 F.2d 1082,1087 (7th Cir. 1994):

> An imperfect peer review could.... constitute evidence from which a fact-finder could infer lack good faith .... [A] peer review might be so deficient that lack of good faith could be inferred simply from the conduct of the review itself.

In other words, an inference can be drawn that respondents' process is so out-of-line with the demonstrated industry practices and other references that it is a charade dressed to resemble the statutory process but so devoid of fairness that it could only have been done by people who do not have *bona fide* reasons to believe the expulsion action met the statutory requirements for immunity. Misconduct in peer review is evidence of a conspiracy. *Boczar v. Manatee Hosp.*, 993 F.2d 1514, 1519 (11th Cir. 1993). Consider the "unrefrigerated dead fish" test of *Parts and Elect. Motors. Inc. v. Sterling Elect., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Dr. Smith has shown through this catalog of unfair acts that respondents are abusing their exclusive power over peer review, the faults of which offend every expressed due process guide or standard including customary practices of the industry as exemplified by *Austin.* (*Also see, Rosenblit v. Superior Court, supra* at 131 Cal. App. 3d 1448, 282 Cal. Rptr. 826. The "hospital resisted fair treatment at every crucial step of the proceedings.").

The Court of Appeals overlooked the many defects in the review before the charges were filed when it says, "Dr. Smith's *only* challenge to . . . the investigation is that he was not permitted . . . evidence of conduct of other doctors' (at 1486, Appendix A at 14a, emphasis added).[18] Appendix F at 50a to the top of 53a lists eight defects in the review raised below and not mentioned in the opinion.

The Court of Appeals failed to discuss Dr. Smith's additional complaints of unfair review which include (among other things cited above): suppression of the eye witness' first report on the L.W. death, suppression of Dr. Fletcher's favorable report. (Dr. McCullough had received it before the JRC, in time to re-examine that charge by returning to the Executive Committee. That was not done, instead, as head of the Executive Committee Dr. McCullough advanced that formal charge to be tried at the JRC), respondents kept that evidence from the full Executive Committee and from the JRC. Finally, consider the inexplicable refusal to have a California Medical Association review (requested by Dr. Smith) such as Dr. Austin received or make arrangements for review by a medical school professor such as Dr. Ostergard who investigated St. Agnes Hospital's practices and Dr. Fobbs (*Fobbs, supra*). Also note a similar outside consultant was retained in *Islami* (*supra* at 1365 and 1380).

From the foregoing a jury could easily find respondents did not conduct a fair review and they did not possess a reasonable belief in the appropriateness of the expulsion.

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18. Dr. Smith argues that § 11112(a)'s first test, furtherance of quality health care at the hospital, begins with assessment of all the doctors to see who is the worst. This is what was done in *McKeel v. Moser,* 96 N.C. App. 401, 386 S.E. 2d 60 (1989); *Freedman v. Delaware County Memorial Hospital,* 672 F. Supp. 171 (E.D. Pa 1987); and *Suckel v. Madison General Hospital,* 362 F. Supp. 1196,1200 (1973). It has support in *Robertson v. McGovern,* 83 F.RD. 79; and *Memorial Hospital v. Shudar,* 664 F.2d 1058. In the instant case such data was ordered to be produced, but it never was.

III. THE § 11113 FEE SHIFT WAS INAPPROPRIATE.

A. Fee Shift Based on Sherman Act Issues Which Were Never Set for Hearing

No Sherman Act antitrust issues were ever litigated in a contested motion, but after a post-judgment fee shift motion was fully briefed with no discussion of Sherman Act issues, the district court raised the Sherman Act questions *sua sponte* in support of its order shifting defense fees onto Dr. Smith. (*See* Appendix E at 47a.) The Court of Appeals' opinion perpetuates those issues, "Dr. Smith produced no evidence suggesting a conspiracy or concerted effort to restrain trade" (at 1487 Appendix A page 18a). The opinion includes a graceless explanation for the district court's criticism that Dr. Smith produced no "direct evidence" of a conspiracy (*see* the district court's full text at Appendix E at 47a from the middle of the page down). "Direct evidence" appears twice in that paragraph: "No direct evidence of an agreement *or other manifestation of conspiracy* was provided [by petitioner]" (emphasis added) and "glaring lack of direct evidence . . . suggests [the] charges were incapable of being proved from the start." Compare that with the Court of Appeals' attempt to read the district court's mind (at 1488, Appendix A at 18a) as to what was intended by those words and changing the context:

> The district court . . . was not using the term 'direct evidence' for its technical evidentiary meaning. Rather, the district court used it to explain that Dr. Smith offered nothing but unsupported allegations.

At oral argument the Court of Appeals asked if there was "direct evidence" of a conspiracy in the district court's words, not in the "unsupported allegations" mode which found its way into the opinion. Had the oral argument question been couched in the

terms of the opinion the answer would have been that the facts recited above show that at each level the respondents acted in concert, and when there were joint meetings their subsequent unfair acts provide inference evidence that they conspired. For example, respondent McCullough and Mr. Campbell, the lawyer for the Executive Committee, suppressed Dr. Fletcher's favorable peer review. Mr. Bartel suppressed the eyewitness first report. Together they worked to prevent Dr. Smith from defending the cath lab L.W. death case against a changed burden of proof that now requires the doctor to prove his innocence. (*See* Appendix F at 55a, item f.) That is just one example of concerted action. Additionally, the court would have been directed to E.R. 259 to 261 in which a new heart clinic costing $1.1 million is described with respondent cardiologists and respondent Health Dimensions as owners. "Unsupported allegations" of conspiracy is not an accurate label for the detailed fact scenario outlined above from which one can infer conspiracy and bad faith lack of belief that the action against Dr. Smith was "in furtherance of quality health care" (in the language of § 11112(a)).

B. Defective Assessment of the Attorney Fees

All respondents were represented by the Crosby firm. The fee application requested a third of a million dollars for the work of 18 lawyers and paralegal staffers. It was clear that there was much duplicated effort. For example, 500 hours (over $50,000) were spent examining about 50 linear feet of committee files utilizing several trips by a car full of lawyers who drove for over an hour each way to GSH to find and copy the possible papers which mention Dr. Smith (E.R. 1427 ¶ 9), rather than having a hospital secretary cull the few records which mention Dr. Smith and just that little batch send to the law office. The Magistrate Judge ordered this item to be paid.

Dr. Smith subpoenaed the Crosby law firm's original entry documents which record time spent on the case and objected

under Federal Rule of Evidence 1006 to the "attorney re-cap" (summaries) submitted by the Crosby firm. They were not "time sheets" or other original entries. (*See* Appendix A at 19a.) For examples *see* E.R. 1374, *et seq.* — the recaps submitted to the insurance company. Dr. Smith submitted a detailed letter-brief on that issue demanding original records which he subpoenaed. However, respondents' counsel refused to produce original time sheets and related documents. (*See Copeland v. Marshall,* 641 F.2d 880, 929 (9th Cir. 1980).)

Dr. Smith contested the legal fee award.Although the magistrate judge commented that the case was overstaffed, she recommended that Dr. Smith pay over $300,000 in fees which the district court ordered.

C. The Fee Shift Hearing Violated Due Process.

None of the respondents paid the Crosby firm. Their fees were paid by Truck Insurance Exchange, a Farmers Insurance Company. The magistrate made a one-third of a million dollar shift award through an *in camera* process from which Dr. Smith's lawyer as well as the Crosby lawyers were excluded. That hearing procedure over such a huge sum of money deprives Dr. Smith of due process.

D. The Fee Shift Will Chill Development of Federal Common Law.

The claim to fee shifting depends on Dr. Smith having filed a frivolous case (§ 11113). Since this is the only case in which there is a documented catalog of violations and departures from the custom of this industry, it would chill the law for this unique suit to be called frivolous where no similar suit shows the inutility of this theory that an overwhelming list of irregular acts in the well-defined peer review, hearing, and appeal process both deprives defendants of HCQIA qualified immunity and is evidence of a

conspiracy attempting to monopolize the market for certain expensive health services.

IV. THE RULE 38 SANCTION ON APPEAL IS NOT APPROPRIATE.

A. Good-Faith Contentions Regarding Interpretation of New Statute

The Court of Appeals attacked petitioner's counsel who represented Dr. Ascherman against St. Francis Memorial Hospital, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975) which is the subject of a complimentary discussion in *Anton* (*supra*). *Ascherman v. St. Francis Hospital* (*supra*, discussed in 9 Witkin *Summary of California Law* 9th Ed., Corporations § 52) requires an in-the-hospital decision-making process that comports with minimal requisites of fair procedures required by "common law standards" (45 Cal. App. 3d at 515, 119 Cal. Rptr. at 511). For over 20 years Dr. Smith's counsel has been in the front line of the physicians' struggle for due process in hospital hearings. (*See Hillsman v. Sutter Community Hospital,* 143 Cal. App. 3d 743, 200 Cal. Rptr. 605 (1984) which is discussed in 2 Witkin, *Summary of California Law* 9th Ed., Agency and Employment §174.)

The court's criticism (at 1489, Appendix A at 21a) was, "Mr. Berg argued this court should apply various state law decisions and professional guidelines *in place of the text* of the HCQIA." (Emphasis added.) No reference to his briefs supports that statement. That argument was *never* made, and it is not a fair reading of the record. The briefs show that counsel contended for use of common law sources, industry practices, and California Business and Professions Code § 809 *to interpret* HCQIA.

For example:

a. Petitioner's Opening Brief, Page 1:

> Appellant contends that the in-the-hospital review of his work, the subsequent hearing, and the internal appeal process of this private administrative expulsion was neither "fair," "reasonable," nor "adequate" *within the meaning of the HCQIA*. [Emphasis added.]

b. Petitioner's Opening Brief in the Fee Shifting Case, Page 1:

> The above earlier appeal (from a Summary Judgment) concerns common law issues of statutory interpretation of the words "fair," "reasonable" and "adequate" regarding private peer review and in-hospital administrative hearing and appeals over a doctor's hospital practice rights *as used in the new . . . Act of 1986, 42 U.S.C. § 11,111 et seq. (hereinafter "HCQIA")*. [Emphasis added.]

c. Petitioner's Opening Brief in Rule 11 Case, Page 8:

In the Rule 11 appeal at page 8 of the opening brief I wrote that various professional association materials and case examples were:

> submitted to the court to help illuminate the words "fair, " "reasonable" and "adequate" — words *which are used* in 42 U.S.C. § 11101, *et seq*. [Emphasis added.]

d. Petitioner's Opening Brief in Rule 11 Case, Page 13:

Regarding a brief filed in the district court about

California Business and Professions Code § 809 I wrote that brief attempted:

> to explain the origin and meaning of the various provisions that got into § 809 as well as others that are implied in the words "fair," "reasonable" and "adequate" in HCQIA which was compared with § 809.

e. Motion for Joint Argument on Appeal:

March 23, 1994 I filed a motion for joint argument with the *Fobbs* case which had also been set for argument on April 12, 1994 (relying on advisory notes to Rule 34 FRAP). On page 2 in the points and authorities thereof lines 17 to 20 I wrote:

> For this reason, appellant suggests that the argument about *what procedures and practices meet the HCQIA tests* of fairness and adequacy should be opened to the *amici* and both captioned cases should be argued together to allow the court easy access to information available through the *amici* in both cases. [Emphasis added.]

The lack of frivolity of appealing the within matter where no other case has provided guidance can be seen in the comment by Weissburg and Aronson, Inc. (above, Appendix H).

It is fair to argue (as Dr. Smith does) that proof of unethical conduct condemned by a major professional organization gives rise to the inference of conspiracy to engage in wrongful conduct to expel a competitor from an important business venue.

Another indication that this appeal was not frivolous is the

Court of Appeals setting the matter for oral argument (heard April 12, 1994) instead of forbidding argument pursuant to FRAP 34(1) and Circuit Rule 34-4(a).

B. No Notice That Sanction Against Counsel Was Contemplated

The court gave no warning that it was interpreting Dr. Smith's briefs as "[arguing] this court should apply various state law decisions and professional guidelines *in place of the text* of the HCQIA" (emphasis added), and there was no notice or opportunity to protest that such a statement had never been made. Counsel is being punished to pay the opponent's legal fee on appeal without a hearing for acts he did not do. And no neutrals reviewed the sanction. *See* Appendix B and C. The November 17, 1994 order is incorrect because the petition for en banc consideration did not contain the factual record — that was only presented in the Motion for General Order 10.9 Proceedings which only the merits panel read.

That legal fee request seeks $137,500 against Dr. Smith's lawyer. (*See* docket entry for September 8, 1994.)

C. Sanction Not Based Upon Inappropriate Action by Counsel

The good faith appeal and briefing of *Smith* in the Court of Appeals did not falsify evidence, take inconsistent positions, or cite repealed or falsified law, which contemptible conduct attracted a well-deserved Ninth Circuit sanction in *Combs v. Rockwell,* 927 F.2d 486 (1991). *Also see, Int'l. Union v. Taska,* 752 F.2d 1401 (1985); and *Malhoit v. S.Cal. Retail Clerk's Union,* 735 F.2d 1139 (1984). Even in the disgusting false document case of *Malhoit* Judge Boochever dissented because he believed the lawyer was entitle to a hearing. Lack of merit in Dr. Smith's appeal (the standard in *McConnell v. Critchlow,* 661 F.2d 116

(1981) opinion by Judge Boochever) is more in the eye of the beholder than in the meticulously documented record of all the HCQIA's § 11112 practice and procedure violations presented by this appeal. *McConnell* concludes with the Rule 11 (Federal Rules of Civil Procedure) right expressed in the American Bar Association code that allows good faith argument for extension, modification, or reversal of existing law.

D. Federal Rule of Appellate Procedure 38 Should be Applied with Restraint.

Heavy-handed use of Federal Rule of Appellate Procedure 38 has been abjured by some courts to avoid an adverse effect on the appellate system. *See N.L.R.B. v. Lucy Ellen Candy Division*, 517 F.2d 551, 555 (7th Cir. 1975):

> notwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action that could become the basis of chilling the assertion of rights reasonably held in good faith by virtue of imposing a penalty because of a failure to prevail in the litigation.

In the Third Circuit a similar approach has been taken. That court

> has been reluctant to classify appeals as frivolous, so that novel theories will not be chilled and litigants advancing any claim or defense which has colorable support under existing law or reasonable extensions thereof will not be deterred.

Hilmon Co., (V.I.) Inc. v. Hyatt Int'l, 899 F.2d 250, 253 (3rd Cir. 1990). *See also, Leidholt v. L.F.P. Inc.*, 860 F.2d 890, 896 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (noting that sanctions may serve to chill zealous advocacy).

CONCLUSION

Certiorari should be granted to define appropriate peer review including in-the-hospital hearing and appeal procedures which earn HCQIA qualified immunity. Conflicts within the Ninth Circuit and between the Ninth and Eleventh Circuits should be resolved. Review should clarify that Federal Rule of Civil Procedure 56 procedure in HCQIA cases should conform to standards previously articulated by this Court. Federal Rule of Evidence 1006 requirements should be clarified. Finally, Federal Rule of Appellate Procedure 38 should be interpreted to provide notice, a right to respond and a neutral review so that lawyers can make reasonable arguments without fear of impoverishing fee shift sanctions for just doing their job.

Respectfully submitted,

JEROME BERG
Attorney for Petitioner

Dated: December 30, 1994

APPENDIX A — *SMITH V. RICKS*, 31 F.3d 1478 (9TH CIR. 1994)

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff, Jerome Berg, Esq., Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

John Phillip SMITH, Plaintiff-Appellant,

v.

William B. RICKS, et al.,
Defendants-Appellees.

Nos. 92-16461, 93-15586, 93-16410 and 93-17300.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 12, 1994.

Decided Aug. 11, 1994.

Appendix A

* * *

Jerome Berg, San Francisco, CA, for the plaintiff-appellant.

Jerome Berg, in pro per.

Paul D. Fogel, Crosby, Heafey, Roach & May, Oakland, CA, for defendants-appellees.

Marilyn Preston, Ann Arbor, MI, for amicus curiae.

Appeals from the United States District Court for the Northern District of California.

Before: FLETCHER, FERGUSON, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Dr. John Smith, a cardiologist, was removed from the staff of Good Samaritan Hospital. After a lengthy peer review process, the reviewing doctors and the hospital concluded that Dr. Smith's performance was below acceptable standards of care and that removal from the hospital staff was necessary to ensure patient safety. Dr. Smith responded by filing a complaint in federal court alleging that the doctors and the hospital had engaged in an antitrust conspiracy against him and violated his due process rights.

The district court granted summary judgment and awarded attorneys' fees and costs in favor of defendants ("Good Samaritan"). The district court held that Good Samaritan was immune from federal antitrust liability pursuant to the Health

Appendix A

Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101-52, which shields peer review participants from liability if certain review standards are met. The district court also held that Good Samaritan was entitled to reasonable attorneys' fees and cost pursuant to 42 U.S.C. § 11113. Furthermore, the district court imposed $2,000 in Rule 11 sanctions against Dr. Smith's attorney, Jerome Berg. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Dr. John Smith joined the medical staff of Good Samaritan Hospital in 1982. In early 1983, a dispute arose over Dr. Smith's prescription of terbutaline to an elderly patient. Dr. Smith allegedly prescribed an improper dosage of the drug. The patient went into cardiac arrest, and although initially resuscitated, subsequently died. The drug order was later altered to reflect a proper dosage, but Dr. Smith denied altering the order. After reviewing the case, the Quality Review Committee ("QRC") of Good Samaritan's Division of Cardiology recommended that the hospital assign preceptors to monitor Dr. Smith for six months. Under a preceptorship, physicians concurrently review another physician's professional performance.[1]

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1. The Good Samaritan Hospital Medical Staff Bylaws ("Bylaws") provide that every physician who provides medical services at Good Samaritan must be a member of the Medical Staff. Appointment and reappointment to the Medical Staff is granted only in accordance with the Bylaws. Initial appointments to the Medical Staff are made for a period of two years, and reappointment for terms of two years is made by the Board of Trustees in accordance with the Bylaws.

The Medical Staff at Good Samaritan Hospital is organized into twelve departments, including the Department of Medicine, Department of Surgery, (Cont'd)

Appendix A

In 1985, the Division of Cardiology's QRC again

(Cont'd)
Department of Pediatrics, etc. The Department of Medicine is organized into four divisions, one of which is the Division of Cardiology. Dr. Smith worked in the Department of Medicine, Division of Cardiology.

The Bylaws provided that each department must have a Department Executive Committee, which is comprised of the Department Chairman, Vice Chairman, Secretary (officers) and one physician appointed by the Department of Family Practice. Each of the officers of a Department Executive Committee is a member of the active medical staff of that department. Every department or division may also form a Quality Review Committee ("QRC") to review data and medical records. Members of the QRC are either elected by the department/division or appointed by the Chairman of the department/division. The QRC reports to that Department's Executive Committee.

The Bylaws outline the procedure for reappointment. First, the Department Executive Committee reviews its members and makes a recommendation on reappointment to the Credentials Committee. The Credentials Committee is comprised of a designee from each department and two elected staff members at large. The Credentials Committee evaluates recommendations from the departments and advises the Medical Staff Executive Committee regarding reappointment.

The Medical Staff Executive Committee is comprised of the Chief of Staff, the immediate past Chief of Staff, the Chief of Staff-Elect, the Secretary-Treasurer, the Chairman of each department and division having fifteen or more active members, and two elected members of the Medical Staff it also has several nonvoting members. The Medical Staff Executive Committee reviews the recommendations of the Department Executive Committee and the Credential Committee and then makes a recommendation to the Board of Trustees.

If the Medical Staff Executive Committee recommends against reappointment, the physician may appeal to the Judicial Review Committee

(Cont'd)

recommended another preceptorship based on Dr. Smith's improper use of streptokinase, an anti-clotting drug. Dr. Smith appealed to the Medical Staff Executive Committee ("MEC"). On August 20, 1985, the MEC upheld the decision of the QRC to monitor Dr. Smith's use of streptokinase through a preceptorship. Dr. Smith did not appeal that decision.

On January 6, 1986, the California Board of Medical Quality Assurance ("BMQA") informed Good Samaritan Hospital that Dr. Smith's staff privileges at another hospital, O'Connor Hospital, had been revoked.[2] Confronted with the BMQA notice, Dr. Smith responded he had been "automatically terminated" from O'Connor because he was not able to associate himself with an "established group." Dr. Smith claimed O'Connor's criticisms of his care were "unfounded" and "only reviewed by a biased

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(Cont'd)
("JRC"). The Bylaws do not describe how members of the JRC are selected, but the record reflects that the JRC in this case was comprised of seven physicians from different departments.

The Bylaws provide guidance regarding the hearing process before the JRC. The Medical Staff is represented at the hearing by a Medical Staff member who is knowledgeable about the matter; he or she is selected by the Chief of Staff. Both the Medical Staff and the person requesting the hearing are entitled to have legal counsel, as is the JRC itself. The Chairman of the JRC serves as the hearing officer. The JRC's recommendation is referred to the Board of Trustees.

The Board of Trustees acts as the final appeals committee. Its decision is final.

2. Pursuant to California Business & Professions Code §§ 805 & 805.1, whenever a physician's staff privileges are terminated, the professional staff responsible for that termination must file a repon with the Medical Board of California (formerly the Board of Medical Quality Assurance).

committee." In fact, the BMQA asked two independent cardiologists to examine the records of five of Dr. Smith's O'Connor patients. One consultant concluded that "Dr. Smith's treatment constituted evidence of negligence and incompetence," and the other consultant found that "review of these cases in my opinion shows a lack of overall medical judgment and care as would be expected by a specialist in cardiovascular disease."

Good Samaritan requested that Dr. Smith provide medical records of the five O'Connor patients as part of its own 1986 biennial review of staff privileges. Despite repeated requests, Dr. Smith refused to release these records until December 1987. Four members of Good Samaritan's Division of Cardiology, each from a different practice group, then conducted separate and independent reviews. They found that Dr. Smith's use of cardiac catheterization testing was below acceptable standards of care.

On April 14, 1988, Dr. Smith met with the Cardiology Executive Committee ("CEC"). The CEC raised its concerns regarding the O'Connor patients. However, because the Good Samaritan records of Smith's patients were not as bad, the CEC eventually recommended reappointment, subject to intensive, 12-month review and monitoring of Dr. Smith's cases.

Unbeknownst to the CEC, one of Dr. Smith's Good Samaritan patients died during a cardiac catheterization procedure just six days prior to their meeting with Dr. Smith. After reviewing the latest incident, the Division of Cardiology concluded Dr. Smith's actions were illogical, his decision to conduct the catheterization was unjustified, and his technical error in performing the procedure caused the patient's death. On June 21, 1988, the CEC again met with Dr. Smith to discuss the

most recent case. Based on that case and his previous problems, the CEC unanimously recommended against reappointment.

Dr. Smith then met with the MEC to review and discuss the CEC's recommendations. On August 29,1988, Chief of Staff Dr. McCullough wrote to Smith that the MEC had unanimously decided to recommend termination of his staff privileges.[3]

Dr. Smith appealed the MEC's decision. Pursuant to the Medical Staff Bylaws, Dr. Smith received a "Notice of Hearing/ Notice of Charges." The charges against Dr. Smith involved: (1) the five O'Connor cardiac catheterization cases; (2) the Good Samaritan patient who died after a 1988 cardiac catheterization; (3) Dr. Smith's inadequate documentation of patient histories and physicals; (4) his use of streptokinase; and (5) his incorrect dosage of terbutaline in 1983. A Judicial Review Committee ("JRC") was convened and held nine days of hearings from April through August, 1989. Each session was transcribed by a court reporter, resulting in over 1,300 pages of transcripts. Dr. Smith was represented by Dr. Douville, a physician-spokesperson, as provided by the Bylaws. The Medical Staff was represented by two physicians. The JRC panel consisted of seven physicians—a hearing officer-chairman, five panel members, and one alternate. Attorneys for Dr. Smith, the Medical Staff, and the JRC also attended the hearings.

The JRC's counsel questioned each panel member in detail concerning possible bias against Dr. Smith (including patient

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3. The MEC offered to consider Smith's reapplication if he would agree to psychiatric treatment and strict monitoring. Because Dr. Smith and MEC were unable to agree on acceptable conditions for reapplication, the MEC reaffirmed its recommendation that Smith's privileges be terminated.

referrals and financial interest in the outcome); two of the panel members ultimately recused themselves. The chairman of the JRC refused Dr. Smith's counsel's voir dire questions as irrelevant to bias or improper attempts at discovery. Dr. Smith's physician-spokesperson questioned the JRC chairman regarding potential bias.

The Medical Staff presented four witnesses. Dr. Smith's physician-spokesperson cross-examined all the witnesses. Dr. Smith introduced 22 exhibits and had access to all evidence the Medical Staff introduced against him. Dr. Smith testified on his own behalf and called one expert witness.

On October 2, 1989, the JRC found the Medical Staff presented sufficient evidence to support every charge, except for the terbutaline charge. Although the O'Connor cases evidenced Dr. Smith's lack of logic and medical judgment, the JRC gave them less weight because they occurred in 1982-83 and Dr. Smith had subsequently been monitored on numerous cases at Good Samaritan. Thus, the JRC recommended a rigorous, two-year preceptorship instead of termination. Believing the sanction was too lenient, the Medical Staff appealed to the Good Samaritan Board of Trustees.

The Board conducted two hearings in December 1989 and January 1990. Dr. Smith submitted a written statement. Dr. Smith's counsel conducted extensive voir dire of the Board members and at least two members recused themselves. Smith's counsel objected to several other Board members, but the Board concluded those members were not biased or prejudiced. On January 20, 1990, the Board reversed the decision of the JRC. The Board found that the preceptorship was a "woefully uncertain protection for patients." According to the Board, a preceptor

could not "anticipate or react quickly enough to further lapses in Dr. Smith's judgment, thought processes and decision-making in conjunction with his treatment of patients undergoing inherently risky cardiac catheterizations." Therefore, "removal from staff by virtue of nonreappointment would appear to be the only measure which would protect patients from the fundamental inconsistencies which have been reflected in Dr. Smith's performance."

Dr. Smith then filed a complaint in federal court alleging that the termination of his staff privileges was the result of violations of the Sherman Antitrust Act, 15 U.S.C. § 1 and 2, and the Clayton Antitrust Act, 15 U.S.C. § 15. The complaint alleged a conspiracy theory encompassing most of the individuals who participated in the peer review proceedings. According to the complaint, the "conspirators" used the peer-review process to monopolize the market for internal medical services. Acts in furtherance of this conspiracy allegedly included conducting a peer-review process that "violated basic due process provisions" and purchasing Mission Oaks Hospital.[4]

On July 14,1992, the district court granted summary judgment for Good Samaritan based on the immunity granted to hospital peer review participants by the HCQIA. *See Smith v. Ricks*, 798 F.Supp. 605 (N.D.Cal. 1992). The court found Dr. Smith could not rebut the presumption of immunity afforded by

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4. Dr. Smith had also maintained staff privileges at Mission Oaks Hospital. In 1989, Health Dimensions, Inc., the operator of Good Samaritan, acquired Mission Oaks Hospital and merged the two institutions. The medical staff of Mission Oaks was dissolved. Staff members of Mission Oaks who did not have privileges at Good Samaritan Hospital were invited to apply. Dr. Smith did not apply.

the HCQIA. *Id.* at 611-12. Dr. Smith's subsequent motion to "correct" or reconsider the decision was denied.

On October 6, 1992, the district court granted Good Samaritan's motion for reasonable attorneys' fees and costs based on 42 U.S.C. § 11113, but denied Good Samaritan's motion for sanctions. The court found that Dr. Smith's claims were "at best without foundation, and at worst, frivolous." Dr. Smith then filed a motion to "correct" the district court's order awarding attorneys' fees and costs. The district court denied the motion. Two days later, Jerome Berg, Dr. Smith's counsel, "renoticed" the same motion.

On December 4, 1992, the district court heard the "renoticed" motion. The court indicated that it intended to deny the motion and sanction Berg $2,500 for unreasonable and vexatious conduct in litigation. Observing that Berg had shown "more than a tolerable amount of disregard" for normal court procedures, the court stated it could not "continue to ignore" Berg's conduct.

Berg filed a motion for reconsideration of the sanctions. He explained that he had intended to file a notice of appeal, but through a "stupid mistake," his confusing instructions caused his secretary to prepare a renoticed motion. Berg said he signed the renoticed motion "in error without realizing that it was not the notice of appeal I had intended." Berg also claimed he was unable to pay the sanction.

On January 8, 1993, the court ordered Berg to show cause by January 29,1993, why its tentative ruling of December 4, 1992, should not be made permanent. On February 17, 1993, the court filed a written order denying Berg's renoticed motion and

imposing $2,000 in sanctions (instead of $2,500). The court relied on Berg's "pattern of misconduct" including making unreasonable discovery requests, filing unauthorized pleadings, filing an improper motion to reconsider/correct summary judgment, and filing the renoticed motion without reading it.

On April 27, 1993, the magistrate judge filed a report and recommendation regarding reasonable attorneys' fees. After a "painstaking review" of counsel's affidavits and unredacted attorneys' time sheets, the magistrate judge recommended awarding $281,344.78 in fees (six percent less than Good Samaritan requested). On August 4, 1993, the magistrate judge recommended awarding $21,777 in costs (six percent less than originally requested). The district court adopted both recommendations in full.

II

Congress passed the HCQIA because it found the threat of liability under federal law "unreasonably discourages physicians from participating in effective professional peer review" and "[t]here is an overriding national need to provide incentive and protection for physicians engaging" in peer review. 42 U.S.C. § 11101(4)-(5). Good Samaritan is immune from antitrust damages under HCQIA if it demonstrates: (1) its professional review actions complied with the fairness standards set out in 42 U.S.C. § 11112(a); (2) it reported the results of the professional review action to state authorities in compliance with §§ 11131-34; and (3) the professional review actions commenced on or after November 14, 1986, the effective date of the HCQIA *See Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir.1992).[5] Dr.

5. The *Austin* court lists a fourth requirement that defendants "satisf[y] § 11112(b)'s requirement of adequate notice and hearing. 979 F.2d at 733. Section

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Smith does not challenge Good Samaritan's compliance with the reporting requirement, nor does he challenge the applicability of the HCQIA. Therefore, the only issue is whether Good Samaritan was entitled to immunity based on § 11112.

Section § 11112(a) provides that a professional review action must be taken:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable

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11112(b) lists a series of characteristics and requirements for conducting hearing's and giving notice regarding professional review actions. However § 11112(b) specifically provides: "A professional review body's failure to meet the conditions described in this subsection shall not in itself constitute failure to meet the standards of [adequate notice and hearing procedures as provided in] subsection (a)(3) of this section. In other words § 11112(b) describes a "safe harbor" for immunity but it is not necessary to satisfy §11112(b) to receive immunity. *see also* H.R.Rep. No. 99-903 99th Cong. 2d Sess. 10-11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384 6393. Because the plaintiff in Austin did not challenge defendants' compliance wiith the notice and hearing requirements we reject as dicta any suggestion in *Austin* that a hospital satisfy § 11112(b) in order to receive immunity.

> effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Because the "reasonableness" requirements of § 11112(a) were intended to create an objective standard, rather than a subjective standard, this inquiry may be resolved on summary judgment. *See Austin*, 979 F.2d at 734. The rebuttable presumption "creates a somewhat unusual standard" of review for summary judgment because the "inquiry focuses on whether [plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts." *Id.* The district court held that Dr. Smith could not rebut that presumption, and we affirm.

A. As the district court noted, Good Samaritan did not begin its review process until the BMQA notified Good Samaritan that Dr. Smith's staff privileges had been revoked at another hospital due to inadequate care. At all stages of the investigation, the peer review participants found that Dr. Smith's treatment was inadequate. Dr. Smith alleges a vague conspiracy by an "ingroup" of doctors out to get him, but he never challenges the substance of their findings. As the district court concluded, Dr. Smith offers no evidence to rebut the presumption that the reviewers "would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients." *Austin*, 979 F.2d at 734 (internal quotations omitted).

B. Good Samaritan conducted a thorough review over the course of almost two years. Good Samaritan reviewed the O'Connor records as well as the Good Samaritan records. Dr. Smith's only challenge to Good Samaritan's investigation is that he was not permitted to discover or introduce evidence regarding the conduct of other doctors. Dr. Smith essentially claims he was not the worst doctor at Good Samaritan. However, nothing in the statute, legislative history, or case law suggests the competency of other doctors is relevant in evaluating whether Good Samaritan conducted a reasonable investigation into Dr. Smith's conduct. Thus, Dr. Smith cannot rebut the presumption that the termination of his staff privileges was made after a reasonable effort to obtain the facts.

C. Dr. Smith's primary challenge to the district court's grant of summary judgment is that the hearings Good Samaritan conducted were inadequate.[6] Dr. Smith claims Good Samaritan is not entitled to immunity unless all the procedural requirements of § 11112(b)(3)(C) are met. However, as discussed previously, § 11112(b) describes a "safe harbor" provision. The statute expressly provides that hospitals need not meet all of the § 11112(b) requirements. The ultimate inquiry is whether the notice and hearing procedures were adequate. *See Fobbs v. Holy Cross Health Sys. Corp.*, 789 F.Supp. 1054,1068 (E.D.Cal.1992), *aff'd.* 29 F.3d 1439, 1445 (9th Cir.1994). Nevertheless, Good Samaritan's hearing procedures satisfied the "safe harbor" provisions of § 11112(b)(3).[7]

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6. Dr. Smith does not challenge the notice of proposed action and notice of hearing that he received from Good Samaritan. Both notices appear to comply with the requirements of § 11112(b)(1) and (2).

7. Only the hearing procedures of § 11112(b)(3)(C) are at issue. Dr. Smith conceded below that the JRC hearing was held before a panel of physicians who

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Appendix A

During the hearing, the physician must have the right:

> (i) to representation by an attorney or other person of the physician's choice,
>
> (ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges. . . .
>
> (iii) to call, examine, and cross-examine witnesses,
>
> (iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
>
> (v) to submit a written statement at the close of the hearing.

42 U.S.C. § 11112(b)(3)(C).

The district court found that Good Samaritan's proceedings satisfied those requirements. We agree. Dr. Smith raises a number of "procedural defects," but we reject his claims. First, Dr. Smith asserts he was denied the right of representation because his attorney could not cross-examine witnesses at the hearings. Dr.

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were not in economic competition with him. Thus the requirement of § 11112(b)(3)(A) was satisfied. Also, there is no question that Good Samaritan gave Dr. Smith a written statement describing the basis for its decision upon completion of the hearings, satisfying § 11112(b)(3)(D).

Smith's attorney, however, was present at the hearings, and Dr. Smith's physician-spokesperson did cross-examine the witnesses. Second, Dr. Smith complains about limits placed on voir dire of the JRC. But § 11112(b)(3) does not require voir dire. It only requires that members of the panel hearing the case not be in direct economic competition with the affected physician. Third, Dr. Smith claims that no retired judge presided over the proceedings and "jury instructions" were not given. Once again, nothing in the statute requires such formalities.

Dr. Smith raises numerous other alleged defects. Essentially, he wants peer review proceedings to look like regular trials in a court of law. Whether or not that is a good suggestion, § 11112(b) does not pose such a requirement. Rather, § 11112(b) lists certain procedures, which, if satisfied, guarantee a shield from liability. Good Samaritan's procedures either fit into the § 11112(b)(3) "safe harbor," or are so close to the "safe harbor" that no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate.[8]

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8. Dr. Smith contends that Good Samaritan cannot be immune from liability because its hearings violated state law and fair procedure guidelines of various professional organizations. Whether or not Good Samaritan violated state law or professional guidelines is irrelevant because once the immunity provisions of the HCQIA are met defendants shall not be liable in damages under any law of the United States or of any State based on a professional review action. § 11111a)(l).

Even if relevant it is not clear Good Samaritan violated state law or professional guidelines. For example at the time of the JRC hearing, California law did not give a physician the right to have an attorney in a peer review proceeding, and the courts had approved of the practice of having the affected physician represented by another physician. *See Anton v. San Antonio Community Hosp.*, 19 Cal.3d 802, 140 Cal.Rptr. 442, 456-57 567 P.2d 1162, 1176-77 (1977); *Gill v. Mercy Hosp.*, 199 Cal.App.3d 889, 245 Cal.Rptr. 304, 311-12, *cert. denied*, 488 U.S. 892, 109 S.Ct. 227, 102 L.Ed.2d 217 (1988).

D. Based on the foregoing, we hold that the district court did not err in granting summary judgment in favor of Good Samaritan. Dr. Smith failed to rebut the presumption that, after a reasonable effort to obtain the facts and an adequate hearing, Good Samaritan reasonably believed its action was warranted.

III

If a defendant "substantially prevails" and satisfies the immunity requirements of § 11112(a), the HCQIA provides:

> [T]he court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

42 U.S.C. § 11113. The policy behind this provision is clear: Congress wanted to encourage professional peer review by limiting the threat of unreasonable litigation expenses. *See id.* § 11101.

The district court held that Good Samaritan was entitled to attorneys' fees and costs. The court noted Good Samaritan satisfied the immunity provisions of § 11112(a) and had substantially prevailed. The court then found that Dr. Smith's "antitrust claims were at best without foundation, and at worst frivolous" and that Good Samaritan suffered great expense in defending themselves against "what was an aggressively, and, at

times, inappropriately prosecuted case." The district court further observed that Dr. Smith produced no evidence suggesting a conspiracy or concerted effort to restrain trade. In other words, the district court believed Dr. Smith had no basis for alleging an antitrust violation and produced no evidence supporting his claim.

We review the district court's decision to award attorneys' fees and costs under the HCQIA for abuse of discretion. *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir.1992), and we affirm. The district court did not abuse its discretion in characterizing Dr. Smith's claim as without foundation or frivolous. Dr. Smith never produced any evidence suggesting an antitrust violation. At best, Dr. Smith pointed out some procedural defects in the hearing process. Dr. Smith argues the district court improperly awarded fees because of the lack of "direct evidence" of the antitrust violations. Dr. Smith correctly points out that "direct evidence" is not always needed to establish an antitrust violation. The district court, however, was not using the term "direct evidence" for its technical evidentiary meaning. Rather, the district court used it to explain that Dr. Smith offered nothing but unsupported allegations.

Dr. Smith argues his claim was not frivolous because of the absence of case law interpreting what procedures were due under the HCQLA. While few courts have addressed the issue, the statute does describe the "safe harbor" procedures in some detail. Because Good Samaritan met those requirements, it is difficult to argue the statute was ambiguous. Moreover, even if it was a close issue whether Good Samaritan was entitled to immunity under the HCQIA, Dr. Smith still had to prove an antitrust violation. As the district court noted, he simply could not.

Dr. Smith also challenges the amount of the attorneys' fees and cost awards as excessive. However, the magistrate judge carefully reviewed the affidavits and billing entries. The final award of $281,344.78 in fees and $21,777 in costs was six percent less than Good Samaritan requested, and apparently significantly less than the expenses Good Samaritan actually incurred. Nothing suggests the amount of the award was an abuse of discretion.

IV

The district court imposed $2,000 in Rule 11 sanctions against Smith's counsel, Jerome Berg. The district court based its sanctions on Berg's "pattern of misconduct" during the course of the litigation culminating in his filing of a renoticed motion to "correct" the district court's order awarding attorneys' fees. We review orders imposing Rule 11 sanctions for abuse of discretion, *see United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992), and we affirm.

Rule 11 imposes a duty on attorneys to certify by their signature that (1) they have read the pleadings or motions they file and (2) the pleading or motion is "well grounded in fact," has a colorable basis in law, and is not filed for an improper purpose. Fed.R.Civ.P. 11; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S.Ct. 2447, 2454, 110 L.Ed.2d 359 (1990). "An attorney who signs the paper without such a substantiated belief shall be penalized by an appropriate sanction . . . [which] may, but need not, include payment of the other parties' expenses." *Cooter*, 496 U.S. at 393, 110 S.Ct at 2404 (internal quotations omitted). According to the Supreme Court, "the central purpose of Rule 11 is to deter baseless filings in district court." *Id.*

To affirm the $2,000 sanction, we need only look to the improperly renoticed motion. Berg claims he meant to file a notice of appeal, but instead renoticed a motion that already had been denied. Berg, thus. admits he did not read the renoticed motion and that it was baseless. Berg pleads it was just a "stupid mistake." But as the district court pointed out, "[C]ounsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head." (quoting *Zuniga v. United Can. Co.*, 812 F.2d 443, 452 (9th Cir.1987)).

As for the amount, Berg claims Good Samaritan incurred no cost in showing up for the December 4 hearing. On its face, the claim is absurd. While the district court did not calculate the exact amount incurred in defending this particular motion, $2,000 is not an unreasonable amount. In light of the entire "pattern of misconduct" and the court's previous restraint in imposing sanctions, it was not an abuse of discretion to award $2,000.

Berg also claims the sanctions were awarded in violation of some vague due process rights. The court gave Berg a full opportunity to explain why sanctions should not be awarded. Although the district court had previously denied Good Samaritan's request for sanctions, it was free to change its mind after Berg continued to engage in his misconduct. There is no "single jeopardy" requirement regarding sanctions.

V

Good Samaritan requests attorneys' fees and costs on appeal pursuant to 42 U.S.C. § 11113. We have awarded appellate fees to the prevailing party under similar statutes. *See, e.g., Gomez v. City of Watsonville,* 863 F.2d 1407, 1419 (9th Cir.1988) (awarding appellate fees under 42 U.S.C. § 1988), *cert. denied,*

489 U.S. 1080, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989). Awarding appellate fees and costs would further the HCQIA's goal of protecting physicians who engage in professional peer review. *See* 42 U.S.C. § 11101(5). We find that Dr. Smith's appeals were frivolous, unreasonable, and without foundation. The law clearly entitled Good Samaritan to immunity, and Dr. Smith could point to no evidence of an antitrust conspiracy. Consequently, Dr. Smith would normally be liable for Good Samaritan's attorneys' fees and costs on appeal pursuant to § 11113.

But if anyone is truly at fault in pursuing this meritless claim, it is Dr. Smith's counsel, Jerome Berg. He should have known his legal arguments were clearly frivolous. Instead of recognizing his misconduct when the district court imposed sanctions, Mr. Berg pressed on. Mr. Berg argued this court should apply various state law decisions and professional guidelines in place of the text of the HCQIA. His appeal of the Rule 11 sanctions is so frivolous that one need only recite his claims to recognize their absurdity. Mr. Berg has wasted this court's time with his baseless appeal and forced Good Samaritan to incur great expense.

Although § 11113 is silent as to who shall pay fees, it is unclear whether we can assess fees against a party's attorney pursuant to the statute. *See Roadway Express, Inc. v. Piper,* 447 U.S. 752, 761 & n. 9, 100 S.Ct. 2455, 2461 & n. 9, 65 L.Ed.2d 488 (1980) (42 U.S.C. § 1988 does not permit recovery from opposing counsel); *Quiroga v. Hasbro, Inc.,* 934 F.2d 497, 504 (3d Cir.1991) (Title VII does not permit recovery from opposing counsel). We do, however, have discretion to award damages, including attorneys' fees, and single or double costs as sanction against bringing a frivolous appeal. Fed.R.App.P. 38; *McConnell v. Critchlow,* 661 F.2d 116, 118 (9th Cir.1981). An appeal is

frivolous if the result is obvious or the arguments of error are wholly without merit. *See McConnell,* 661 F.2d at 118. Because we conclude the appeal was wholly without merit, we choose to exercise our discretion and grant Good Samaritan single costs and attorneys' fees for this appeal pursuant to Fed. R.App.P. 38. Mr. Berg, not Dr. Smith, is ordered to pay this award because Mr. Berg is directly responsible for making frivolous legal arguments, both in his own appeal and Dr. Smith's appeals. *See In re Becraft,* 885 F.2d 547, 548 (9th Cir.1989) (recognizing authority to impose Rule 38 sanctions directly on counsel); *see also Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1201 (7th Cir.1987).

Attorneys for Good Samaritan shall file affidavits and documentation regarding fees earned in this appeal with the clerk of the court within 14 days from the date of entry of this opinion. The amount of the award shall be established by a supplemental order.

AFFIRMED WITH SANCTIONS.

APPENDIX B — NINTH CIRCUIT ORDER (UNPUBLISHED) OF OCTOBER 4, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16461
D. C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

No. 93-15586
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff,

JEROME BERG, Esq.,

Appellant,

v.

WILLIAM B. RICKS, et al.,

Defendants-Appellees.

Appendix B

No. 93-16410
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

No. 93-17300
D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

ORDER

Before: FLETCHER, FERGUSON and TROTT, Circuit Judges.

Jerome Berg, Esq.'s Motion to Recuse the Panel is DENIED.

His motion for proceedings under Ninth Circuit General

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Order 10.9 is also DENIED. General Order 10.9 concerning Sanctions Imposed Against Counsel or a Party states as follows: "No order to show cause need be issued if a party requests the imposition of sanctions in a motion or brief to which the party opposing sanctions has an opportunity to respond." The brief of the appellee in case No. 92-16461 states, ' The Act entitles Good Samaritan to an award of attorneys' fees if Dr. Smith's law suit was frivolous, unreasonable, without foundation, or conducted in bad faith *§ 11113.*" Such a statement is sufficient to make applicable the quoted exception in General Order 10.9, and the panel regards the statement as more than sufficient to put counsel on notice that his lawsuit was being challenged as frivolous.

Moreover, Mr. Berg was aware of the accusations that his lawsuit was frivolous. In his opening and reply briefs, he responded explicitly to such charges and vigorously defended his position. No purpose would have been served by giving him yet another chance to make his case on this issue.

Nevertheless, out of an abundance of caution, the panel has reviewed Mr. Berg's Request for proceedings Pursuant to Ninth Circuit General Order 10.9 (including his personal declaration) filed September 8, 1994 in its entirety and reconsidered *de novo* the issue of whether sanctions are appropriate in this case. Upon such reconsideration, the panel reaffirms its original conclusion. The order of sanctions against Jerome Berg, Esq. shall stand as originally ordered.

The calculation and award of attorneys' fees is ordered transferred to the district court from which this appeal was taken. *See* Circuit Rule 39-1.8.

MOTIONS DENIED. Attorneys' fees transferred to the district court.

APPENDIX C — NINTH CIRCUIT ORDER (UNPUBLISHED) OF NOVEMBER 17, 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17300

D.C. No. CV-91-20368-JW

JOHN PHILLIP SMITH,

Plaintiff-Appellant,

v.

WILLIAM B. RICKS, et al.

Defendants-Appellees.

ORDER

On October 18, 1994, Jerome Berg filed with this court a document entitled Petition for Rehearing of Denial of General Order 10.9 Proceedings and Request for Rehearing En Banc. In response to an earlier Petition for Rehearing and Request for Rehearing En Banc filed by him on September 8, 1994, however, this court had already issued on October 4, 1994 a dispositive order denying (1) his motion to recuse the panel, and (2) his request for proceedings under General Order 10.9; and transferring the issue of attorneys' fees to the district court. In that order, the court advised Mr. Berg that the exception in General Order 10.9 excusing the need for an order to show cause

was applicable to his request, thus rendering his request inappropriate. Moreover, the sanctions issues of which he continues to complain in his October 18, 1994 filing were previously before the full court as a result of his September 8, 1994 request for a rehearing en banc, including his specific claim that General Order 10.9 "was ignored." As Mr. Berg was notified in a final dispositive order filed October 5, 1994, "The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35."

Thus, Mr. Berg's first suggestion for rehearing en banc and his petition for rehearing filed on September 8, 1994 were denied on October 5, 1994.

Accordingly, Mr. Berg's renewed request for recusal and a rehearing en banc is untimely, deemed out of order, and

REJECTED.

APPENDIX D — *SMITH V. RICKS*, 798 F. SUPP. 605 (N.D. CAL. JULY 15, 1992)

John Phillip SMITH, M.D., Plaintiff

v.

William B. RICKS, M.D.,
et al., Defendants.

No. C. 91-20368 JW.

United States District Court,
N.D. California.

July 15, 1992

* * *

Jerome Berg, San Francisco, Cal., for plaintiff.

Chris G. Gasparich, Mary C. Oppedahl, Jennifer A. Shy, Jeffrey L. FAzio, Crosby, Heafey, Roach & May, Oakland, Cal. for defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WARE, District Judge.

Plaintiff John Smith brings this action alleging violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and Section 6 of the Clayton Act, 15 U.S.C. § 17. Plaintiff's claims arise out of an alleged conspiracy and collusive effort by the Defendants to diminish Plaintiff's surgical practice by revoking his staff privileges at Good Samaritan Hospital of the Santa Clara Valley.

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Plaintiff has named numerous defendants in his complaint, including a number of physicians "involved in the operation of the medical staff activities" at Good Samaritan; Good Samaritan Hospital Hospital and Health Dimensions, Inc., which controls Good Samaritan; a majority of the board of trustees of Good Samaritan, which voted to revoke Plaintiff's staff privileges; and two legal advisors of the above described Defendants. Pl.['s] Compl. For Damages. Defendants filed this motion for summary judgment, pursuant to Fed.R.Civ.P. 56. Defendants assert that under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 et seq., they are immune from federal antitrust liability.

I. BACKGROUND

Plaintiff first applied for staff privileges at The Good Samaritan Hospital of the Santa Clara Valley in November, 1981. Plaintiff became an Associate member of the medical staff in February, 1982. In March, 1983, Plaintiff's status was upgraded from Associate to Active.

Pursuant to California regulations, staff privileges must be reviewed biennially. In August, 1984, Plaintiff applied for renewal of his privileges, and in January, 1985, he was reappointed to the Hospital's medical staff. In the reapplication form, Plaintiff stated that he was appealing a decision regarding his status at another hospital, O'Connor Hospital ("O'Connor").

On January 6,1986, the California Board of Medical Quality Assurance ("BMQA") informed Good Samaritan Hospital that Plaintiff's staff privileges at O'Connor Hospital had been revoked. The loss of privileges was based on Plaintiff s medical treatment of five patients at O'Connor Hospital. When Defendant

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Ullrich, then Chairman of the Department of Medicine at Good Samaritan, inquired into the details of the O'Connor decision, Plaintiff stated that the patient care claims were unfounded, were reviewed by a biased committee, and that his termination was based on a "failure to advance." Good Samaritan asked O'Connor to provide medical records for the five O'Connor patient cases which prompted Plaintiff's loss of privileges at O'Connor. Plaintiff objected to release of the documents and to an investigation by the Good Samaritan staff. Ultimately Plaintiff consented to the release of the files, and the files were received by Good Samaritan in late December, 1987.

In September, 1986, Plaintiff was once again required to submit to a biennial review of his staff privileges at Good Samaritan, as required by State regulation. The 1986 reapplication, which occurred during the investigation of Plaintiff's termination from O'Connor Hospital, was ultimately denied by Good Samaritan Hospital.

In early 1988, Defendants Ricks, Murphy, Siegel and Ullrich, who are cardiologists at Good Samaritan, reviewed the O'Connor case files and concluded that Plaintiff's treatment of those patients had been below acceptable standards of care. All five of these cases had involved the cardiac catheterization of patients.

On April 14,1988, Good Samaritan's Cardiology Executive Committee met with Plaintiff and discussed the five O'Connor cases. Unbeknownst to the Committee, six days prior to this meeting, a patient of Plaintiff's died during a cardiac catheterization procedure. On June 9, 1988, the Committee reviewed the case file of this latest patient death, and on June 21, 1988, discussed the matter with Plaintiff. The Committee

ultimately concluded that Plaintiff's privileges should be revoked. Good Samaritan's Department of Medicine Executive Committee concurred.

On July 14, 1988, the Hospital's Medical Staff Executive Committee ("MEC") received the above recommendations. Plaintiff met with the MEC on August 19,1988. The MEC interviewed Plaintiff regarding each incident which preceded the recommendation to revoke his privileges. On August 29,1988, the MEC notified Plaintiff it had adopted the recommendation to revoke Plaintiff's staff privileges. The MEC did indicate, however, that Plaintiff could reapply for staff privileges provided he agree to a number of conditions, including training and consultation requirements, as well as a reduced work load. The MEC and Plaintiff were unable to reach a mutual agreement on acceptable conditions for Plaintiff's reapplication. Accordingly, the MEC put forth a recommendation to revoke Plaintiff's staff privileges "based on [Plaintiff's] inability to interpret, organize and analyze medical information and use it as a basis for making medical judgments." Def.['s] Supplemental Statement of Undisputed Facts RE Def.['s] Mot. for Summ. J.

Thereafter, Plaintiff sought review of the MEC's decision by the Hospital's Judicial Review Committee ("JRC"). Plaintiff received notice of the JRC hearing, which included nine individually held sessions. Each session was transcribed by a court reporter, resulting in over 1,500 pages of transcription. The hearings were held before a hearing officer and a panel of physicians who were not in economic competition with Plaintiff. The sessions were held between April 17, 1989 and August 29, 1989. Plaintiff was represented by counsel at the sessions, and was permitted to call, examine and cross-examine witnesses. A total of six witnesses were called during the course of the hearings.

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Plaintiff introduced 22 exhibits into evidence at the JRC hearing, and was presented with all evidence introduced by the medical staff. Plaintiff claims that he was denied the opportunity to have a comparison survey of Defendant "physician-competitors" medical services rendered at Good Samaritan Pl.['s] Compl. for Damages. Plaintiff argues the survey would have shown that his own work was as good, if not superior to, the work of the doctors reviewing Plaintiff's cases. Plaintiff claims the survey would show that the decision to revoke his privileges was both arbitrary and the product of an effort to eliminate Plaintiff as an economic competitor in the field of cardiac care.

On October 2,1989, the JRC decided that the charges against Plaintiff were supported by facts and evidence. The JRC confirmed that Plaintiff's treatment of the five O'Connor patients was below an acceptable standard of care; that the records of Plaintiff's patients revealed a lack of logic, organization and judgment; and that the patient death in April, 1988 resulted from similar treatment as that exhibited by Plaintiff in the O'Connor cases. However, the JRC decided to reappoint Plaintiff to the medical staff with significant preceptorship requirements. Plaintiff accepted this decision and filed no appeal.

On October 16, 1989, the Medical Staff appealed the JRC decision to the Hospital's Board of Trustees. The Medical Staff argued that the preceptorship was not sufficient to ensure patient welfare. Plaintiff was notified of the Board's hearing and submitted a written statement. Plaintiff, represented by counsel, attended the two hearings held by the Board. The hearings were transcribed. Plaintiffs counsel conducted a voir dire of the Board. The Board accepted the JRC's findings of fact and accepted no new evidence from either party. On January 20, 1990, the Board reversed the decision of the JRC, and ordered the termination of

Plaintiff' s staff privileges. The Board found that preceptorship was not adequate protection of patient welfare, given the nature of the cardiac procedures Plaintiff would be performing, and the history of Plaintiff's medical performance.

Plaintiff's antitrust allegations extend beyond the events at Good Samaritan Hospital described above. Plaintiff had also maintained staff privileges at Mission Oaks Hospital in the Santa Clara Valley. In 1989, Health Dimensions, Inc., the operator of Good Samaritan, acquired Mission Oaks Hospital. and merged the two institutions into a single hospital called Good Samaritan. The medical staffs of the two hospitals were merged, and the staff of Mission Oaks was dissolved. Staff members of the former Mission Oaks Hospital who did not have privileges at Good Samaritan were invited to apply; Plaintiff chose not to do so.

The substance of Plaintiff's complaint can be described as a conspiracy theory encompassing most of the individuals who participated in the various reviews and appeals described at length above. Plaintiff alleges that the defendant cardiologists "covered" for each other by not conducting reviews of each other's work through an audit procedure. Plaintiff further alleges a number of due process violations during the review process, including 1) that a legal advisor used by the committees was a family relative of one of Plaintiff's accusers; 2) that the Hospital by-laws imposed the burden of proof on Plaintiff to show that the decision to expel Plaintiff lacked a basis in fact or was otherwise arbitrary; 3) that Plaintiff was denied the opportunity to present a comparative survey of medical performance by all physicians in the cardiology department, 4) that Plaintiff was not permitted to

present evidence of other cardiologists' cases at Good Samaritan; 5) that Plaintiff's counsel was not permitted to cross-examine adverse witnesses or otherwise actively participate in the hearing process; and 6) that Plaintiff's counsel was not permitted through voir dire to expose bias in review committee members.

It is Plaintiff's contention that the above alleged conduct, as well as the acquisition of the Mission Oaks Hospital, is evidence of a conspiracy to restrain competition in and to monopolize the practice of internal medicine within the relevant market of Santa Clara County.

II. DISCUSSION

1. *Legal Standard*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. P.Civ.P. 56(c). "[T]he inquiry focuses on whether the nonmoving party has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the nonmoving party's claim." T.W. *Electrical Service, Inc. v. Pacific Electrical Contractors Ass n.*, 809 F.d 626 (9th Cir.1987).

At the summary judgment stage, the resisting party must proffer more than broadly sweeping allegations in order to establish a genuine issue of material fact. Plaintiff's submissions to this Court suffer from an excess of allegations, and a glaring absence of any detailed explanations.

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It is not sufficient to claim that due process has been violated; a party must state exactly how and when and by whom due process was violated. This burden requires a degree of specificity that Plaintiffs submissions clearly lack. The Court finds no genuine issue as to any material fact in this case, thus making summary judgment proper. The Court finds that the Health Care Quality Improvement Act of 1986 confers immunity on the Defendants as to federal antitrust liability, and accordingly the motion for summary judgment is GRANTED.

2. *Health Care Quality Improvement Act of 1986*

In 1986, Congress passed the Health Care Quality Improvement Act ("the Act"), making the following findings:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law,

> unreasonable discouraged physicians from participating in effective peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101 (West 1991) (emphasis added).

The Act provides immunity from damages under any federal or state law, provided that the requirements of the Act are satisfied. *Id.* at § 11111. Immunity is available to professional review bodies; to members and staff of these bodies; to persons under contract or other agreement with these bodies; and to persons participating with or assisting these bodies. *Id.* In order for Defendants to receive immunity, this Court must make three findings: (1) that the peer review process conducted by Defendants satisfies the due process requirements articulated in the Act, (2) that the results of the review were reported to State authorities; (3) and that the review actions occurred on, or after November 14, 1986, the effective date of the Act. *Austin v. McNamara,* 731 F.Supp. 934, 939 (C.D.Cal.1990).

a. *Standards for Professional Renew Actions*

Section 11112 of the Act sets out-the standards for review which are required for immunity from antitrust liability. Section 11112(a) requires that the review actions be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician invoked or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Id. at § 11112(a) (emphasis added).

i. *The Action Was in Furtherance of Quality Health Care*

In order to prove that the review actions conducted by Defendants were taken in the reasonable belief that they were in furtherance of quality health care, Defendants must show that "with the information available to them at the time of the professional review action, [Defendants] would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." *Austin* at 940.

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The review process which is the subject of this suit was commenced after the BMQA notified Good Samaritan Hospital staff that Plaintiffs staff privileges had been revoked at another hospital due to the inadequate care Plaintiff had provided in five specific cases. The review of these five O'Connor cases commenced in early 1988. The Good Samaritan Board of Trustees' final decision to revoke Plaintiff's staff privileges, culminating months and years of investigations and hearings, was not issued until January 20, 1990.

Although the JRC did not recommend to revoke Plaintiff's privileges, the JRC did find that Plaintiff's treatment of the the O'Connor cases was below acceptable standards of care, and that Plaintiff exhibited deficiencies sufficient to warrant a significantly conditioned reappointment to the medical staff. This Court finds that there is no evidence, beyond the unsubstantiated allegations of Plaintiff, that the review was conducted without the reasonable belief that the action was in furtherance of quality health care.

ii. *The Action Was Conducted After a Reasonable Effort to Obtain the Facts of the Matter*

Defendants must next demonstrate that the review action was taken after a reasonable effort to obtain the facts of the matter. 42 U.S.C. § 11112(a)(2) (West 1991). Defendants obtained the five O'Connor case files and conducted a separate investigation into the quality of Plaintiff's care. Plaintiff alleges that the O'Connor Hospital findings were the result of unfounded claims and a biased review process. Despite his asserted belief that the case files did not reveal deficiencies in the quality of his care, Plaintiff objected strongly to a review of the O'Connor cases by the Good Samaritan staff. Ultimately Plaintiff dropped his objections and the files were reviewed by the Good Samaritan staff.

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In addition to the review of the O'Connor cases, the medical staff and Plaintiff both participated in further investigation into Plaintiff's professional performance at Good Samaritan. This Court finds that the review action conducted by Good Samaritan Hospital was made after a reasonable effort to obtain the facts of the matter. Although Plaintiff attacks the review process because he was not permitted to introduce evidence of the performance of other physicians, the Act's requirements do not suggest that a peer review must focus on the conduct of any physician other than the one being reviewed.

iii. *Adequate Notice and Hearing Procedures Were Afforded to Plaintiff*

Section 11112(a)(3)) of the Act requires that the Defendants provide adequate notice and hearing procedures, or other fair procedures. *Id.* at § 11112(a)(3). The Act, in § 11112(b), specifies procedures to be used by peer review bodies; however, the section concludes by stating, "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." *Id.* at § 11112(b). The legislative history of the Act confirms that the specifications within the Act need not be followed verbatim, and that the ultimate inquiry is if the procedures utilized were "adequate". 1986 U.S. Code Cong. & Admin.News, 6287 at 6393.

There is no indication that Plaintiff did not receive adequate notice of the professional review action and of the hearings conducted; thus, § 11112(b)(1) and (2), which require proper notice of both review actions and any hearings which are to be held, were satisfied.

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Section 11112(b)(3) deals with the conduct of hearings. Plaintiff's JRC hearing was held before a panel of physicians who were not in economic competition with Plaintiff, thereby satisfying § 11112(b)(3)(A). Section 11112(b)(3)(C) specifies a number of rights which must be afforded to the physician under review.

There is evidence that the first four of the five rights were afforded Plaintiff because: 1) Plaintiff was represented by an attorney of his choice; 2) a record of the proceedings was made; 3) Plaintiff called, examined and cross-examined witnesses at the hearing; and 4) Plaintiff presented evidence which had been determined relevant by the hearing officer, regardless of its admissibility in a court of law. The fifth right which must be afforded Plaintiff is the right to submit a written statement at the conclusion of the hearing. There is no evidence that such a statement was submitted, nor is there evidence that Plaintiff was prevented from doing so. Accordingly, this Court finds that Defendants satisfied the requirements of § 11112(b)(3)(C).

Finally, § 11112(b)(3)(D) requires that at the end of the hearing process, Plaintiff has the right to a written recommendation from the panel including the basis for the panels recommendations. The JRC gave Plaintiff a written recommendation, which included its basis for the recommendation. Accordingly, the last requirement is also satisfied.

iv. ***Defendants Had a Reasonable Belief that the Action was Warranted by the Facts Known After a Reasonable Effort to Obtain Facts and After Meeting Due Process Requirements***

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The final requirement for immunity to be conferred on Defendants is that the review action of Plaintiff was "taken in the reasonable belief that the action was warranted by the facts known after such reasonable efforts to obtain facts and after meeting the [due process requirements]." *Id.* at § 11112(a)(4). The Court finds, having already concluded that the review action conducted by Defendants satisfied the standards of § 11112(a)(2) and (3), that based on the facts presented to Defendants and the procedures utilized by Defendants, revoking Plaintiff's staff privileges was warranted. This finding of the Court is premised on the analysis set out above.

v. *Plaintiff Has Not Overcome the Presumption that Defendants Met the Standards of § 11112(a)*

The evidence presented by Defendants demonstrates that Good Samaritan's review action warrants the protection afforded by the Act. Defendants have shown that they satisfied the standards specified in § 11112(a). "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11112(a) of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.* at § 11112(a).

The Court finds, in reviewing Plaintiff's submissions, that Plaintiff's broadly based allegations of conspiracy and flagrant violations of due process rights are largely unsubstantiated. Plaintiff makes claims as to the current state of the law, the technical competence of other physicians at Good Samaritan Hospital, and broad accusations of the Good Samaritan review proceedings being akin to a "kangaroo court" Pl.['s] Mem. of Law in Opp'n to Mot. for Summ. J. What Plaintiff fails to do, however, is explain in detail how and when any of these

allegations truly occurred and why they are relevant to the question of whether the Defendants' review action warrants immunity. The Court. is not required to conduct discovery for the Plaintiff in order to take the unsubstantiated allegations within Plaintiff's papers and match them up with facts that tend to support these theories and claims.

The Court finds, based upon the undisputed facts in this case, and upon the evidence advanced by Plaintiff, that Plaintiff has not and cannot rebut the Act's presumption of immunity by a preponderance of the evidence.

b. *Defendant's complied with the Act's Reporting Requirements*

"The immunity provided by § 11111(a)(1) can be forfeited if the health care entity fails to report any disciplinary action taken against a physician resulting from a professional review action. § 11111(b). The details of any 'professional renew action that adversely affects the clinical privileges of a physician for a period of longer than 30 days must be reported to the Board of Medical Examiners, §§ 11133(a)(1)(A); 11133(a)(3)(A)(C)." *Austin* at 942. The Act defines "adversely affects" to include the revocation of staff privileges. 42 U.S.C. § 11151.

Defendants have presented copies of the appropriate Form 805, which was sent to the BMQA and which outlined the background and resolution of Plaintiff's case. The Act requires that the report to the agency include the following: the physician's name; a description of the reasons for the action taken; and other appropriate information. *Id.* at § 11133. This Court finds that the contents of the form comport with the requirements of § 11133, and the BMQA is the appropriate agency.

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c. *The Professional Review Action(s) Occurred After the Effective Date of the Act*

The Act became effective on November 14, 1986, and the Court finds that the professional review action(s) which precipitated this lawsuit occurred after that date. The Act requires that a review action occur after November 14,1986 in order to qualify for immunity from liability. The Court's finding is premised on the chronology of events presented above.

III. CONCLUSION

The Defendants have satisfied each requirement of the Act, and accordingly, the Court finds that the professional review action conducted by Defendants warrants immunity from federal antitrust liability. The Court finds in consideration of the Act's broad grant of immunity within § 11111, that immunity should be conferred on all named Defendants in the present action.

Accordingly, because all of the named Defendants are immune from federal antitrust liability by virtue of the Health Care Quality Improvement Act of 1986. Defendants' motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

APPENDIX E—DISTRICT COURT ORDER (UNPUBLISHED) OF OCTOBER 6, 1992

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C 91-20368 JW

JOHN PHILLIP SMITH, M.D.,

Plaintiff,

vs.

WILLIAM B. RICKS, M.D., ET AL.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS, AND DENYING PLAINTIFF'S MOTION FOR SANCTIONS

Defendants move for attorney fees, costs and sanctions following this Court's Order granting summary judgment in Defendants' favor. Pursuant to 42 U.S.C. § 11113, Defendants seek recovery of attorney fees and costs. Defendants also seek sanctions against Plaintiff and Plaintiff's counsel, pursuant to Fed. R. Civ. P. 11. Plaintiff, in his opposition to the instant motion, seeks Rule 11 sanctions against Defendants' counsel. For the reasons set forth below, Plaintiff's motion for sanctions is DENIED, and Defendants' motion for attorney fees and costs is GRANTED.

I. BACKGROUND

The factual background of this case is outlined in the Court's Order granting summary judgment. In essence, this case was

brought by Plaintiff after he lost his medical practicing privileges at The Good Samaritan Hospital of the Santa Clara Valley. Plaintiff sued a number of defendants, including members of the Hospital's Board of Trustees, individual physicians who reviewed Plaintiff's medical work, and the corporation which controls Good Samaritan Hospital. Plaintiff alleged violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and Section 6 of the Clayton Antitrust Act, 15 U.S.C. § 15. The substance of Plaintiff's allegations was that his loss of privileges was the result of a conspiracy and collusive conduct by the Defendants.

This Court granted summary judgment in favor of Defendants, holding that Defendants were immune from antitrust liability, pursuant to the Health Care Quality Improvement Act of 1986, ("the Act"), 42 U.S.C. §§ 11101-11152.

II. DISCUSSION

1. Recovery of Attorney Fees and Costs Under the Act

The Act provides for the payment of attorney fees and costs in appropriate instances. *Id.* at § 11113. The Act states:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the

> claim, was frivolous, unreasonable, without foundation, or in bad faith.

Id. Thus, the Court must determine whether Defendants satisfy the Act's requirements prior to awarding attorney fees and costs.

> [I]n order to recover litigation expenses, defendants must establish (1) that they are among the persons covered by § 11111; (2) that the standards set in § 11112(a) were followed; (3) that they substantially prevailed; and (4) that [Plaintiff's] claims or conduct during the litigation were frivolous, unreasonable, without foundation or in bad faith.

Wei v. Bodner, Civ. No. 89-1137, 1992 WL 165860 (D.N.J. April 8, 1992).

In granting summary judgment, the Court held The Act's immunity provision, specified at § 11111, extended to all named Defendants in this action. The Court also found that Defendants satisfied the Act's standards for professional review actions, as specified at § 11112(a). There is no question Defendants substantially prevailed, having been granted summary judgment in their favor as to the entire case. Thus, the only question remaining is whether Plaintiff's claim or litigation conduct was either frivolous, unreasonable, without foundation or in bad faith.

In order to establish a Section 1 violation under the Sherman Act, a plaintiff must prove the existence of "(1) an agreement or conspiracy, (2) resulting in an unreasonable restraint of trade and

(3) causing 'anti-trust injury.'" *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1332 (9th Cir. 1986) (citing *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978)). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnel Corp.*, 384 U.S. 563 (1966).

Quite candidly, Plaintiff failed to produce any direct evidence of an organized conspiracy or concerted effort to restrain trade, as required by the Sherman Act. Most, if not all, of Plaintiff's evidentiary offerings attempted to show that Defendants failed to meet the minimal due process requirements of the Health Care Quality Improvement Act. While it would have been necessary to prove a failure to meet those requirements, as that is one way to circumvent the Act's immunity against antitrust liability, it appears the substance of Plaintiff's entire case revolved around that one issue. No direct evidence of an agreement or other manifestation of conspiracy was provided. Moreover, nothing beyond the accusations of Plaintiff's counsel addressed the legal question of whether Defendants created a restraint of competition, or an actual monopoly.

Viewing the lawsuit in a light most favorable to Plaintiff, even if Dr. Smith felt confident of his ability to prove that his due process rights were violated by Defendants (and that, consequently, they should not be immune from liability), he still faced a significant challenge to prove the elements of a Sherman Act violation. The glaring lack of direct evidence to support any of the elements for an antitrust violation suggests that Plaintiff's charges were incapable of being proven from the start.

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The public policy behind the enactment of the Health Care Quality Improvement Act of 1986 is to encourage peer review of medical practitioners as a means of bettering the quality of available medical care. It is lawsuits such as this one which Congress perceived as stifling the peer review process, as doctors and hospital personnel feared the possibility of significant antitrust liability stemming from the lawsuits filed by angry practitioners. The immunity provision of the Act is broadly applied to the variety of people who play key roles in the peer review process. And, in Congress' judgment, the minimum requirements which must be satisfied in order to receive the Act's immunity are sufficient.

Plaintiff's antitrust claims were at best without foundation, and at worst frivolous. Nevertheless, Defendants were put to great expense and effort to defend themselves in what was an aggressively, and, at times, inappropriately prosecuted case on Plaintiff's part. If the Act's policy of discouraging these types of law suits is to be actualized, then clearly this is an instance where the recovery of attorney fees and expenses is appropriate. Defendants claim total expenditures of $323,880.02 in defending against this action. The Court orders that all reasonable attorney fees and costs be awarded to Defendants, and refers the matter to the Magistrate Judge to determine the proper recovery amount.

The Court finds that no other sanction beyond the recovery of attorney fees and costs is warranted. The Court denies, as well, Plaintiff's motion for sanctions, as the motion is without sufficient basis in fact or law.

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III. CONCLUSION

For the reasons set forth above, the Court orders that Defendants shall be awarded their reasonable attorney fees and costs associated with defending against Plaintiff's lawsuit. The amount of fees and costs shall be determined by the Magistrate Judge.

IT IS SO ORDERED.

DATE: OCTOBER 6, 1992

s/ James Ware
HONORABLE JAMES WARE
United States District Judge

APPENDIX F — UNFAIR PEER REVIEW ACTS

Dr. Smith's opposition to the summary judgment motion for HCQIA immunity (under § 11112) shows the following facts:

1. The review process was unfair and in violation of customary industry practice* because:

   a. only "in-group" doctors participated in the hospital's ongoing basic peer review of all cases. "Out" doctors like Dr. Smith rarely participated. (E.R. 372)

   b. When Dr. Smith's procedures (such as use of streptokinase) were challenged at the department level (long before charges were filed) he asked for the department's standards for these procedures and outcome profiles of his peers. These requests were refused. (E.R. 369) The only criticism of his streptokinase use is a difference of opinion by competitors as expressed in a "confidential" letter by accuser, defendant Dr. Ulrich which is not supported by medical literature or any outside expert. In this "confidential" letter, Dr. Ulrich wrote:

      > [T]hree of Dr. Smith's cases in which the drug streptokinase was used were felt to be irregular by the Medical Quality Review Committee. . . . The central concern of the committee is that good medical judgment in the use of this drug was not exercised, rather than the fact that a specific protocol or particular method was not utilized. (E.R. 477)

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* Both the district court and the Court of Appeals listed a few of Dr. Smith's fair procedure defects and ignored the most important ones. Where the opinions mention these defects the citation is provided.

Dr. Smith's lucid analysis of one of those cases is found at E.R. 570 to 576 in which he provides references to the medical literature which he relied on for his successful thrombolytic treatment. The patient was up and walking after being bed-bound before the treatment.)

c. The chair of the Staff Executive Committee, Dr. McCullough, suppressed Dr. Fletcher's favorable evaluation which concluded that there was no negligence. The hospital's stamp shows they received this report March 13, 1989. Appellant got it in discovery. It is at E.R. 536 and 537. A copy was not sent to Dr. Smith pursuant to academic peer review custom. Both Dr. McCullough and Ross Campbell, Esq., the Executive Committee's lawyer, kept Dr. Fletcher's report from the full membership of the Executive Committee.

d. Outside evaluation, a standard industry practice, (such as the California Medical Association evaluation provided for Dr. Austin* and a medical school professor provided for Dr. Fobbs*) which Dr. Smith requested in writing (E.R. 370) was also refused.

e. Regarding the death of heart catheterization patient L.W. which is prominent in the August 11, 1994 opinion, an initial incident report by the eyewitness nurse was withheld from the investigators and reviewers at every level including the JRC (E.R 400-2, 428, 511-2), and it is still suppressed despite demands by Dr. Smith for its production in this action. (See Item 2(c) infra)

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* See case citations in the footnote of page 4 hereof.

f. Dr. Marcus was very critical of the extensive complications experienced by defendant doctors which appear in the cath lab log a copy of which Dr. Smith had obtained before he was expelled. These documented malpractices (which went unpunished) prove a double standard favoring the "in group" conspirators whose harm to the public is white washed. (See the testimony of Dr. Marcus at E.R. 411 to 441 and pages from his huge curricula vitae 460 to 468) In this connection, death of a walk-in cath lab patient killed by Dr. Nagel was covered-up because Dr. Nagel prevented a "code" pink sheet from being issued. Dr. Nagel had "cathed" this patient who was in congestive heart failure (CHF) — a contra-indicated act. (See CHF note at E.R. 908, 909) Dr. Marcus went on to question why the entire department's work was not reviewed and disclosed in the interest of quality health care.

g. Although, the Trustees have ultimate responsibility for patient care, it appears that they do not review surveys of medical complications of these physician defendants or otherwise audit to assure the quality of care being rendered. While other departments at Good Samaritan Hospital (for example, infection control E.R. 268 and orthopedics E.R. 269) conduct audits of various procedures to identify problems and to rank the doctors, the Trustees have not required similar surveys of the internists and cardiologists who bring in this high-paying hospital work.

h. As Chief of the Cath Lab, the Coronary Care unit and the Cardiology Diagnostics section, Dr. Nagel can both initiate hostile reviews of his competitors and "white

wash" malpractices committed by his friends. No independent "out group" cardiologist can initiate a review to which Dr. Nagel objects.

2. Once charges were initiated by the Medical Executive Committee assisted by Ross Campbell, Esq. the matter came to trial beginning April 17, 1989 before a committee of doctors (Judicial Review Committee ("JRC")) picked by the defendants and "advised" by Keith Bartel, Esq. the cousin of one accuser (Dr. Nagel)* Mr. Bartel deliberated with the JRC and wrote their opinion. That hearing was defective because:

   a. *Voir dire* of the JRC regarding personal and business ties to the accusers was forbidden by Mr. Bartel (798 F. Supp. 608, Claim No. 6) in violation of California decisional law. The 31 Fed. 3d 1486 discussion of the permitted *voir dire* is misleading. Mr. Bartel did not allow the JRC to answer the written list of questions Dr. Smith submitted about whether JRC panelists or members of their families were patients of the accusers or if they had other business or professional connections. In the middle of the JRC we discovered a JRC member was a patient of Dr. Ricks. See my protest letter at E.R 481. Obviously, the limited *voir dire* allowed by Mr. Bartel did not reach this type of connection. (Noted at 798 Fed. Supp. at 608 Item No. 6 and Ruled on at 31 Fed. 3d at 1486, HCQIA: "does not require *voir dire.*")

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* Mr. Bartel was engaged for this function by defendant hospital organization in contrast to the customary practice of having a retired judge advise the JRC (noted at 31 Fed. 3d at 1487). Compare *Fobbs v Holy Cross* 789 F. Supp. 1054 (E.D. Cal. 1992) and *Austin v McNamara* 979 F.2d 728 (9th Cir. 1992)). At my last previous JRC with this hospital we had a retired judge officiate. (See E.R 410.)

b. No record (required to gain the irrebuttable presumption of an adequate hearing procedure delineated in § 11112(b)(5)(C)(ii)) was made of the "Jury" instructions Mr. Bartel gave to the JRC with whom he deliberated. (See AOB page 19.) In this connection the appeal opinion at 31 Fed. 3d at 1487 is confusing because it suggests there were no instructions by Mr. Bartel.

c. The eyewitness nurse's first report was suppressed (see l(e) *supra*). Existence of this report came to Dr. Smith's attention when the nurse testified at the JRC. Mr. Bartel ruled that Dr. Smith was not entitled to present this exculpating evidence to the JRC. Dr. Smith was given a second report made a week or so later after Mr. Bartel's cousin, Dr. Nagel, consulted with this nurse. (E.R. 170 to 173 is the JRC transcript of this nurse's testimony on this point and Mr. Bartel's ruling, which demonstrates he was in charge of the JRC in the manner of a trial judge).

d. Dr. Fletcher's academic "peer review" evaluation was suppressed. (See E.R. 434 which is that letter, and note that a copy was sent to attorney Campbell who attended all sessions of the JRC.)

e. Dr. Smith's lawyer could only participate at the JRC as a "potted plant" (Noted at 798 Fed. Supp. at 608 Item No. 5 and at 31 Fed. 3d at 1486), contrary to California Business and Professions Code § 809 which was enacted after the JRC and before the appeal to the hospital's trustees.

f. The burden of proof was upside down — on Dr. Smith, contrary to the prior practice at Good Samaritan Hospital which put the burden on the accuser. (See 798 F. Supp. 608, Claim No. 2) That unfair burden of proof is contrary to subsequently enacted California Business and Professions Code § 809. When I represented a doctor at such a hearing at GSH in prior years the burden was on the accuser (E.R. 410).

g. The hospital refused to produce Dr. Smith's 1800 charts which document his good reporting and treatment skills (E.R. 42, 295 and AOB page 23). This was exculpatory evidence to defend the charge of poor charting in a few cases.

h. Dr. Smith's request for departmental standards and outcome profiles of all doctors in his field was denied. (See 798 F. Supp. 608, Claim Nos. 3 and 4.)

i. A group of old cases from O'Connor Hospital (another anti-competitive hospital) was the basis for one of the charges despite California law that discourages resort to such outdated events. The decision acknowledges that similar grievances were not found in Dr. Smith's practice at Good Samaritan Hospital.*

3. At the appeal hearing before the hospital's Board of Trustees:

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* The opinion incorrectly describes these as heart catheterization cases which they are not, but the error was made in the district court. Nevertheless, see E.R. 904 which does not describe the O'Connor cases as cath cases. They are complex internal medicine cases where reasonable physicians might suggest a variety of treatments.

Appendix F

a. Ten out of fifteen of the trustees who decided the case were tied to the accusers as patients themselves, family members of patients, or in business relations (which connections were documented in a *voir dire* examination). They refused to step aside. (E.R. 538, see transcript of trustees meeting at E.R. 931)

b. Mr. Simmonds, the legal advisor to the trustees, made no record of his "jury" instructions to the trustees with whom he deliberated and whose opinion he wrote. (E.R. 355, see also AOB page 19.)

c. The JRC decision to keep Dr. Smith on staff was disregarded by the trustees in derogation of the then-effective California Statute on this specific issue. (California Business and Professions Code § 809.05)

APPENDIX G — SIGNIFICANT SECTIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986, 42 U.S.C. § 11111 *ET SEQ.*

CHAPTER 117—ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

* * *

§11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Appendix G

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon

payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses.

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

§ 11113. Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a)

of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

§11114. Guidelines of the Secretary

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.

APPENDIX H —NEWSLETTER, WEISSBURG AND ARONSON

(Omitted Here But Submitted Separately As Lodging Appendix)

Supreme Court, U.S.
FILED
MAR 2 1995
CLERK

(2)

No. 94-1187

In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

v.

WILLIAM B. RICKS, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE SEMMELWEIS SOCIETY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court below violated the plain terms of 42 U.S.C. § 11111(b)(3)(C)(i) which states:

> in the hearing the physician involved has the right to representation by an attorney or other person of the physician's choice

where the court below granted immunity to a peer review entity that refused to permit Petitioner's lawyer to speak or play an effective role in the peer review hearing.

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INTEREST OF AMICUS

The Semmelweis Society[1] takes its name from the 19th century Hungarian physician, Ignaz Semmelweis, who was vilified by his colleagues and superiors in the medical profession because of his strongly-held belief that physicians should wash their hands and use clean instruments before delivering babies and performing surgery. His life ended in disgrace for advocating views which ultimately led to the breakthroughs of Lister and Pasteur.

Semmelweis is remembered in history as the classic victim of abuse of power by fellow professionals to the detriment of society. Despite the fact that Semmelweis' mortality rate was lower than his peers', he was the doctor scrutinized. The Semmelweis Society is dedicated to seeing that the peer review process in the United States is not used to drive good doctors – often the efficient, innovative and economical – from the profession by cutting off their hospital privileges for reasons having nothing to do with the improvement of the quality of medical care. The non-profit Society, incorporated under the laws of California, is comprised of members who have been aggrieved by bad faith peer review. In fact, some members – targeted by improperly motivated peer review – have successfully visited this Court in the past, *Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991) and *Patrick v. Burget*, 486 U.S. 102 (1988). Other members and supporters have pressed similar claims in lower courts, *Boczar v.*

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[1] The Society sought and was given permission of the Petitioner and Respondent to file this brief. Their letters are on file with the Court.

Manatee Hospital, 993 F.2d 1514 (11th Cir. 1994); *Bolt v. Halifax Hospital*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

The Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152, grew out of the *Patrick* case,[2] and provides immunity for properly conducted peer review activities. It specifically states that a physician under review is entitled to representation by an attorney.

The HCQIA imposes its due process criteria to ensure that peer review actions are taken in the furtherance of quality of care and not as a pretense for anticompetitiveness or health care entity politics.[3] These requirements safeguard a doctor's right to work at his profession by ensuring a physician is not excluded from health care entities due to arbitrary, capricious or anticompetitive reasons.

In the case at bar, Petitioner had a lawyer present at the hearing but he was prohibited from speaking and actively representing the Petitioner. Amicus contends that when Congress provided that a physician under review

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[2] Thaddeus J. Nodzenski, *Where Is The Quality In The Health Care Quality Improvement Act of 1986?*, 22 Loy. U. Chi. L.R. 361, 361 (1991) ("Largely in response to the jury's verdict in *Patrick*, Congress passed the Health Care Quality Improvement Act.").

[3] *See, e.g., Patrick v. Burget*, 486 U.S. 102 (1988); *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991); *See, also*, Pauline Martin Rosen, *Medical Staff Peer Review: Qualifying the Qualified Immunity Provision*, 27 Loy. of L.A. L.R. 357 (1993) (detailing legislative history and case law demonstrating abuse of peer review function).

has "the right to be represented by an attorney" it meant that the lawyer must be permitted to act as a lawyer.

The court below erroneously granted immunity notwithstanding the fact that Petitioner was denied the right to have counsel of his choice speak and participate at a peer review hearing conducted by Respondents. The court below held that the failure to afford Petitioner the right to an attorney as provided in the HCQIA was "close" to what the statute requires. This the HCQIA does not permit.

SUMMARY OF ARGUMENT

Petitioner was subjected to a peer review hearing conducted under the auspices of the Respondent Hospital. During the hearing Petitioner wanted an attorney to speak for him but Petitioner was effectively denied this right.

The HCQIA defines procedures that will be deemed adequate to meet the due process prong of the statutory immunity requirements. It provides:

> (C) in the hearing the physician involved has the right to
>
> (i) representation by an attorney or other person of the physician's choice,
>
> (ii) have a record made of the proceedings . . .
>
> (iii) to call, examine, and cross-examine witnesses,
>
> (iv) to present evidence . . . , and

> (v) to submit a written statement at the close of the hearing. . . .

42 U.S.C. § 11112(b)(3)(C)(i)-(v).

The right to representation by an attorney is paramount because it is an attorney who can effectively ensure at each step – e.g., notice and hearing – that the physician receives the process due him. It is an attorney who can present the facts, supported by the testimonial and documentary evidence, to assure a fair hearing and a fair record – the essence of due process. As the Court stated more than 30 years ago:

> The right to be heard would be, in many cases, of little avail if it did not comprehend *the right to be heard by counsel*. Even the intelligent and educated layman . . . lacks both skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Gideon v. Wainwright, 372 U.S. 342, 344-45 (1963) quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

Congress wrote – plainly and unequivocally – a physician has "the right to representation by an attorney . . . of [his] choice." 42 U.S.C. § 11112(b)(3)(C)(i). Respondents denied Petitioner this right and they, therefore, are not entitled to immunity.

ARGUMENT

FOR IMMUNITY TO ATTACH UNDER THE HCQIA, THE PEER REVIEW HEARING MUST BE FAIR AND ADEQUATE: IT MUST AFFORD THE PHYSICIAN "THE RIGHT TO [EFFECTIVE] REPRESENTATION BY AN ATTORNEY."

For more than three quarters of a century, the "right to work for a living in the common occupations of the community" has enjoyed substantive as well as procedural due process protections. *Truax v. Raich*, 239 U.S. 33, 41 (1915). In the leading case of *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held that the right to work at one's trade or profession is of the very essence of the personal freedoms that was the purpose of the Due Process and Equal Protection provisions to secure. *Id.* at 144 n.12. In *Meyer*, the Court stated that while it had not attempted to define with exactness the liberty guaranteed by the Due Process Clause, it had no doubt that the right to engage in one's occupation is "one of several fundamental liberties," like the right of the individual to "acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long ago recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 626.

The California Supreme Court in *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566 (1969), building on this case, explained that "[a]ny limitation on the opportunity of employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and

happiness; courts sustain such limitations only after careful scrutiny." *Id.* at 579. The court added that "employment in a *particular* occupation was a significant, if not fundamental, interest entitled to special protection." *Id.* at 584-585 & n.46. It is this right that is at stake here. The HCQIA bestows total immunity for properly conducted peer review proceedings, even if they are maliciously initiated and even if they erroneously ruin a physician's reputation.

Only within the context of a properly conducted peer review hearing does a doctor have a chance to vindicate his good name. Once immunity attaches, a physician has no remedy for the harm caused him by defamatory and untrue statements made under the guise of peer review. For as this Court has recognized:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> Twas mine, 'tis his, and has been salve to
> thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 12 (1990) *quoting* WILLIAM SHAKESPEARE, OTHELLO, Act III, scene 3.

The repercussions from peer review actions reverberate forever through a physician's professional career. The HCQIA creates reporting requirements to a National Data Bank. All actions that deny, restrict or revoke privileges for quality of care reasons must be reported. A doctor's peer review record must be checked by all health

care entities prior to granting privileges. 42 U.S.C. §§ 11131-11135. A doctor's livelihood, therefore, is on the line at all peer review proceedings. It is this fundamental right – the right of a physician to continue in his chosen profession – that is implemented in this case. The hearing, if properly conducted, affords the doctor under review his only day in court. It must be a fair day.

A. The Statute Plainly Requires And Petitioner Was Denied The Right To Effective Representation By An Attorney.

The court below recognized that the statute required representation by an attorney, *Pet.* 15a, but nevertheless held that an attorney "present" at the hearing but forbidden to speak or participate was either an exact "fit" or "so close" to the statute that this requirement had been satisfied. *Pet.* 16a.

Section 11112(b)(3)(C) lists those hearing aspects considered so intrinsic to fairness that adhering to them creates a presumption of fairness under the Act. At the top of the list for "in the hearing," the Act provides the right to "representation by an attorney." This placement is no accident – for this is the most important and protective of all procedures. It provides the doctor with a trained advocate who recognizes and appreciates the high stakes at risk in the proceedings and champions the doctor's cause. It is an attorney who can ensure that the other elements required for fair procedures are complied with – that a record is made as provided for in 42 U.S.C. § 11112(b)(3)(C)(ii); that witnesses are called, examined, and cross-examined as provided for in 42 U.S.C.

§ 11112(b)(3)(C)(iii); and that relevant evidence is presented as provided for in 42 U.S.C. § 11112(b)(3)(C)(iv). In short, the right to representation by an attorney is essential to HCQIA fairness.

Petitioner's attorney was "present" but he was a mere on-looker, who was not allowed to function as an advocate in the proceedings – he could not make comments on the record, he could not examine and cross-examine witnesses. *Pet.* 7a, 15a, 16a & n.8. The court below – by equating mere presence with representation – in effect authorized pseudo-lawyering. No one would doubt, for example, that an operation performed with a surgeon merely whispering instructions to a lay person is not "close" to having an operation by a surgeon. Similarly, here, the presence of Petitioner's attorney at the hearing is not close to Petitioner having an attorney of his choice represent him.

B. Only Hearings Complying Verbatim With § 11112(b)(3)(C) Are Entitled To A Presumption Of Adequacy Under The Act; Respondent's Hearing Which Failed To Provide Representation By An Attorney Was Erroneously Afforded This Presumption By The Court Below.

The Act provides three sets of interdependent criteria which a peer review entity must meet for qualified immunity – the criteria as provided in sections (a), (b), and (c) of § 11112. Section 11112(a), provides the general criteria that must be met,

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken –

(1) in the reasonable belief that the action was in the furtherance of quality of care,

(2) after a reasonable effort to obtain the facts in the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the requirement of paragraph (3).

This section establishes its own interdependency scheme – for in paragraph (4) it reiterates that the reasonable effort required in paragraph (2) must be met as well as the notice and hearing requirements of paragraph (3) to reach the reasonable belief requirement of (4). For paragraph (4) requires that the disciplinary action be warranted after a full investigation and hearing. Each element of section (a) is a hurdle the peer review entity must abide by, with (4) incorporating each element that precedes it.

Next, section 11112(b) details the notice and hearing aspects that will be presumed to meet the criteria of section 11112(a)(3) – and as such provides the measuring stick for all peer review hearing issues. Section 11112(b)(3) provides in relevant part:

(C) in the hearing the physician has the right –

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing

Meeting the criteria of § 11112(b) creates a presumption that the peer review body has complied with the requirement of § 11112(a)(3) and the failure to meet the specific criteria provided, "in and of itself" does not indicate per se that the proceedings were not fair. 42 U.S.C. § 11112(b)(3). Conversely, failure to meet the criteria must, *per se*, indicate that the proceedings require scrutiny to determine whether or not they are fair. The court below failed to consider the plain meaning of this particular phrase of the statute and thus failed to apply it to the facts of Petitioner's case.

At this juncture – with the specific criteria of (C) not met – a court must evaluate the significance of each element not complied with – and determine the impact of that particular denial of due process on the fairness quotient of the entire proceedings. This interpretation of the

application of the presumption of adequacy is supported by the legislative history which states:

> The Committee is aware, for example, that some courts have already carefully spelled out different requirements for certain professional review activities or actions, such as procedures for decisions regarding applicants for clinical privileges at a hospital. In those situations, compliance with applicable law should satisfy the "adequacy" requirement even where such activities or actions require different or fewer due process rights than the ones specified in . . . In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices.

H. Rep. No. 903, 99th Cong., 2d Sess. 10-11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393.[4]

Rephrased, it was the intent of the legislature that if the due process procedures provided did not match the provisions detailed in § 11112(b), then they must match existing case law. In other words, prevailing law must

---

[4] The California Supreme Court in *Bixby v. Pierno*, 4 Cal. 3d 130 (1971), drew a sharp distinction between those applying for a license and those holding a license to practice their profession, stating that the former do not, while the later do, have a vested fundamental right. *Id.* at 144. The court explained that in cases involving applications, the courts have largely deferred to the administrative expertise of the agency, but "once the agency has initially exercised its expertise and determined that the individual fulfills the requirements to practice his profession, the right is vested and fundamental." *Id.* at 146. Petitioner had been granted staff privileges at Respondent's hospital. The peer review of the case at bar concerned the renewal of such privileges.

have reviewed identical procedural processes and found them to have been fair and unbiased. In the case at bar, the court chastised Petitioner for putting forth the proposition that state case law or industry guidelines would be relevant in evaluating whether or not the procedures provided him were fair. *Pet.* 16a n.8. The court commented that Petitioner wanted the peer review proceedings to "look like regular trials in a court of law." *Id.* Amicus' reading of the HCQIA, which details specifically in § 11112(b)(C) such proceedings, is that the HCQIA intended particular safeguards. One such specific – and, yes, trial like protection – is representation by a speaking, participating attorney. For physicians, particularly in light of the immunity provided by the HCQIA, the hearing is a doctor's only setting to ensure his right to practice medicine is properly protected.

To complete the interdependency scheme of the statute, section 11111(c) provides exceptions – none of which are applicable to this case – to the stringent due process requirements of section (b). Section (c) details three situations:

> (A) where there is no adverse professional review action taken, or
>
> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
>
> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action

> may result in an imminent danger to the health of any individual.

where the reviewing body is not required to comply with § 11112(b). Section (c) specifically deals with egregious and emergency situations requiring swift action by the health care entity in the interest of patient safety which amicus contends represents the "other procedures as are fair to the physician under the circumstances" provided for in § 11112(a)(3). This reading of section (c) is supported by the legislative history which states:

> Subsection (c) modifies the due process required to obtain immunity under section 101(c) during investigations or in health emergencies. Under this priority, there is no requirement that due process meet a test of adequacy . . .

H. Rep. No. 903, 99th Cong., 2d Sess. 11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6394. *See also,* Susan L. Horner, *The Health Care Quality Improvement Act of 1986: It's History, Provisions, Applications, and Implications,* 16 Am. J. L. & Med. 455, 470 (1990).

The court below failed to appreciate the interdependency created by the statute and controlling for evaluating statutory immunity. It short-circuited the statutory scheme at section 11112(a) and uniformly applied a presumption in favor of the peer review entity. The plain language of the statute imparts specific due process protections indicative of fairness that carry their own presumption of adequacy. This Court has uniformly insisted on the plain reading of a statute. *Connecticut National Bank v. Germain,* 503 U.S. ___, 112 S. Ct. 1146, 1149 (1992)

("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The court below ignored the manner in which § 11112(b) and (c) were specifically designed to define the requirements of § 11112(a)(3). The presumption in favor of a peer review entity provided in § 11112(a) is qualified by the "deemed to have met" criteria detailed in (b). In fact, the legislative history indicates that the presumption in favor of the peer review entity is limited to 42 U.S.C. § 11112(a)(1) –

> The presumption applies only to the reasonable belief standard, not to the other standards. Those additional standards require a group engaged in peer review to make a reasonable effort to obtain the facts, *to provide adequate due process*, and to have a reasonable belief that the professional review action was warranted by the facts known.

H. Rep. No. 903, 99th Cong., 2d Sess. 10 (1978) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393 (emphasis added).

The court below, however, erroneously applied the presumption of adequacy to procedures that did not meet the "deemed adequate" criteria, *Pet.* 16a, and concluded that "no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate." *Id.* Amicus contends that reasonable jurors could conclude that allowing an attorney to be present – but not to perform lawyering functions – is not the same as the statute's requirement for "representation by an attorney."

Reasonable jurors could make this distinction and determine that the hearing was not adequate and did not qualify for immunity.[5]

C. Respondents Did Not Comply With The HCQIA's Requirements For Immunity And Are, Therefore, Not Entitled To Immunity Under The Act.

Case law has established that a physician not provided with the fair notice and hearing procedures of the Act does *not* have a private cause of action against the health care entity. But failure to comply with the Act does deny immunity to the peer review entity. *Hancock v. Blue Cross-Blue Shield*, 21 F.3d 373 (10th Cir. 1994); *Goldsmith v. Harding Hospital, Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991). Accordingly, the court below should have denied immunity to Respondents because they did not allow Petitioner to be represented by an attorney in accordance with the HCQIA.

CONCLUSION

The courts must not make it easy for peer review committees and procedures to circumvent a doctor's right to protect his right to practice and his professional reputation. The most certain way to ensure that doctors are

[5] Petitioner lists in his Petition, Appendix F, other discrepancies that reasonable jurors might recognize as unfair. A review of these allegations is outside the scope of this amicus brief.

not improperly sanctioned is to provide due process safeguards for the doctor, this is what the HCQIA does. An indispensable safeguard is the right to representation by an attorney.

The Court should grant the petition for writ of certiorari to review the important question of whether a peer review entity that denies a physician the right to effective representation by an attorney of his choice is nevertheless entitled to immunity under the HCQIA. Unless the petition is granted, the erroneous decision of the court below will be used to deprive physicians nationwide of effective representation by an attorney.[6]

The Semmelweis Society respectfully asks this Court to restore honor to physician discipline proceedings by reviewing and overturning the decision of the court below.

---

[6] *See, e.g.*, American Bar Association, Section of Antitrust Law, PRACTICAL IMPLICATIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT, ANTITRUST ANALYSIS 48 (1994):

> The only case that has addressed this issue [representation by an attorney] is *Smith v. Ricks* [798 F. Supp. 605 (N.D. Cal. 1992)], where the court implicitly held that the failure to allow plaintiff's counsel to cross-examine witnesses did not render the proceedings unfair to the physician when the physician was allowed to call, examine, and cross-examine witnesses.

The Petition for Certiorari should be granted.

Dated: March 2, 1995

Respectfully Submitted,

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No. 94-1187

In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

vs.

WILLIAM B. RICKS, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The issues in this case are:

(1) Did the Court of Appeals properly affirm the summary judgment in favor of Respondents William B. Ricks, et al. ("Good Samaritan"), finding them immune from antitrust liability under the Health Care Quality Improvement Act of 1986 (42 U.S.C. §§ 11101 *et seq.*) because they afforded petitioner John Phillip Smith, M.D., proper peer review procedures and revoked his medical staff privileges in the reasonable belief that doing so was necessary to ensure patient safety, given petitioner's needless and/or egregiously sub-standard cardiology practices that caused the deaths of two patients and endangered the lives of several others?

(2) (a) Did the Court of Appeals correctly uphold the district court's award of fees and costs under Section 11113 of the Act [42 U.S.C. § 11113], on the grounds that petitioner conducted this litigation unreasonably and inappropriately and that his claims or conduct were frivolous, unreasonable, without foundation or in bad faith?

(b) Did the Court of Appeals correctly uphold the district court's determination of the amount of fees and costs awarded Good Samaritan, where: (i) The magistrate judge, to whom the calculation of fees was referred, conducted a detailed review of unredacted attorney billing statements and awarded substantially less than the actual fees and costs incurred; (ii) the district court used proper procedures in making its fees and costs award;

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

and (iii) petitioner offered no evidence that the fees and costs were unreasonable?

(3) Assuming this Court has jurisdiction to entertain this claim:

(a) Did the Court of Appeals properly order petitioner's counsel to pay Good Samaritan its reasonable appellate attorneys' fees and costs under Federal Rule of Appellate Procedure 38, on the ground that this appeal was "wholly without merit" and in some instances "absurd" and that counsel should have known his arguments were "clearly frivolous"?

(b) Did the Court of Appeals give counsel adequate notice and opportunity to be heard concerning the Rule 38 sanction by reviewing counsel's numerous submissions and reconsidering its decision *de novo* before reaffirming it?

LIST OF PARTIES

Petitioner did not include a list of parties before this Court and to the proceedings below in his Petition, as required by Supreme Court Rule 14.1(b). Good Samaritan therefore provides this list of the parties:

Petitioner: John Philip Smith, M.D.

Respondents: William B. Ricks, M.D., Michael R. Nagel, M.D., Jack Siegel, M.D., Thomas F. Murphy, M.D., David W. McCullough, M.D., Daniel J. Heinrichs, M.D., J. Robert Ulrich, M.D., Keith P. Bartel, Esq., Constantine J. Samios, M.D., Gordon Simonds, Esq., Good Samaritan Hospital of the Santa Clara Valley, Health Dimensions, Inc., Mary Anderson, Dean Bartee, Joy Drinker, J. Handel Evans, Richard Herington, Lorraine Hultquist, Marlin Krebs, Brooks Mancini, Diana Mascali, Barbara McGee, Wade Meyercord, Peter Knoll, Paul O'Neil, Barbara Peterson, and Roy Strasburger.

RULE 29.1 STATEMENT

In accordance with Rule 29.1, Respondent Health Dimensions, Inc., states that it is the only corporate Respondent in this proceeding. In May 1994, Health Dimensions, Inc., became Good Samaritan Health System (GSHS). GSHS is a non-profit corporation doing business as four separate hospitals: Good Samaritan Hospital of Santa Clara Valley; Good Samaritan Hospital - Mission Oaks; South Valley Hospital; and San Jose Medical Center. GSHS is the sole corporate member of the following organizations: Visiting Nurse Association, Inc. (VNA, Inc.), Health Dimensions Medical Foundation, dba Good Samaritan Medical Foundation, Good Samaritan Hospital of Santa Clara Valley Foundation, and Wheeler Hospital Association. VNA, Inc. is the sole corporate member of VNA Continuing Care, Inc. and Visiting Nurse Assocation Home Care, Inc. GSHS has no parent companies.

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JOHN PHILLIP SMITH, M.D.,

Petitioner,

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WILLIAM B. RICKS, M.D., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL OPINIONS BELOW

Good Samaritan refers in this brief to the following orders of the Court of Appeals, copies of which appear in its Appendix: (1) the order denying petitioner's Petition for Rehearing and rejecting the Suggestion for Rehearing en Banc (Oct. 5, 1994, App. A); (2) the letter rejecting petitioner's counsel's request for additional review of the Fed. R. App. P. 38 sanction (Dec. 12, 1994, App. B); and (3) the order denying counsel's requests for extraordinary proceedings and to recall the mandate (Feb. 7, 1995, App. C).

JURISDICTION

One of the issues petitioner raises is that the Court of Appeals erroneously ordered his counsel to pay Good Samaritan its appellate fees and costs under Fed. R. App. P. 38. Counsel is the only party aggrieved by that judgment, however, and he has not petitioned. Because the only petitioner before the Court, Dr. John Smith, is not aggrieved by that judgment, he lacks standing to seek certiorari of it. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 474-75 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 394 (1st Cir. 1978). Accordingly, this Court should disregard the arguments concerning the Fed. R. App. P. 38 fees and costs award against petitioner's counsel.

ADDITIONAL PERTINENT STATUTORY PROVISIONS

Ninth Circuit General Order 10.9 governs procedures for imposition of sanctions on appellate counsel. Petitioner here contends that the Court of Appeals did not follow that order when it sanctioned his counsel under Fed. R. App. P. 38. The full text of that order appears in Appendix D to this Brief.

COUNTERSTATEMENT OF THE CASE[1]

Respondents here are Good Samaritan Hospital of the Santa Clara Valley, its parent, Health Dimensions, Inc., and twenty-five individuals – eight physicians, two lawyers and fifteen members of Good Samaritan's Board of Trustees (collectively "Good Samaritan"). Petitioner, a cardiologist, sued resondents for alleged antitrust violations after Good Samaritan conducted a detailed peer review proceeding and declined to renew petitioner's hospital staff privileges. That decision was based on repeated and egregious lapses in judgment and professional competence that endangered patient safety and led to several patient deaths. The district court and Court of Appeals found Good Samaritan immune as a matter of law under the Health Care Quality Improvement Act ["the Act" or "HCQIA"], 42 U.S.C. section 11101 *et seq.* (All further statutory references are to Title 42 of the United States Code). The district court and Court of Appeals decisions (Pet. App. 28a-43a; Pet. App. 1a-22a) correctly state the background facts, and Good Samaritan

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[1] Throughout this Brief, Good Samaritan utilizes the following abbreviations: "Pet." denotes the Petition for Certiorari; "Pet. App." denotes the Appendix to the Petition for Certiorari; "App." denotes the Appendix to this Brief in Opposition; "ER" denotes the Excerpts of Record and Amended Excerpts of Record filed in the Court of Appeals; "SER" denotes the Supplemental Excerpts of Record filed in the Court of Appeals; "CR" denotes the Clerk's Record and will be followed by the district court docket number of the relevant document. Briefs filed in the Court of Appeals will be referred to as "AOB" (Appellant's Opening Brief), "AB" (Appellees' Brief), and "RB" (Reply Brief) in each appeal. Citations to the Court of Appeals' opinion here are to pages in Petitioner's Appendix rather than to the published version at 31 F.3d 1478.

hereby adopts those statements as its own. Good Samaritan adds that the district court had jurisdiction under 28 U.S.C. sections 1331 and 1337. S. Ct. R. 14.1(i), 24.2.

REASONS FOR DENYING THE PETITION

A. The Opinion Below Does Not Create A Conflict Regarding The Interpretation Of The Immunity Provisions Of The Health Care Quality Improvement Act Or The Federal Summary Judgment Standards

Petitioner's attempt to find a "certworthy" issue by spinning alleged "conflicts" out of whole cloth must fail. The decision below is in harmony with those of other Courts of Appeals that have interpreted the Health Care Quality Improvement Act's immunity provisions and the related summary judgment principles that implement them.

1. The Courts Of Appeals Are Not In Conflict Concerning The Burden Of Proof And Standard Of Review For Immunity Under The HCQIA

Peer review – the ongoing monitoring and evaluation of staff physicians – is a hospital's primary means of ensuring physicians' competence and limiting the hospital's liability for their incompetence. *Cf. Bell v. Sharp Cabrillo Hosp.*, 212 Cal. App. 3d 1034 (1989). Hospitals must have an approved peer review program to participate in federal Medicaid and Medicare programs [§§ 1395x(k), (r), (s), 1396a(19), (26)], to comply with California law [Cal. Code Regs. tit. 22, § 70701(a)(7)], and to gain accreditation by the Joint Commission on Accreditation of Healthcare Organizations [*1991 Accreditation Manual for Hospitals* at 99-120 (1991)); *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 811 (1977)].

When the peer review process identifies an incompetent physician and the hospital limits or terminates his or

her privileges, the physician often turns to the courts for redress. However, because the physician may have little or no chance of success in state court (especially given the immunities that state law affords peer review participants, *e.g.*, Cal. Civ. Code §§ 43.7, 43.8), he or she often sues in federal court under federal antitrust provisions, where state exhaustion and/or privilege provisions may not apply. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1031 (9th Cir. 1989), *aff'd*, 111 S. Ct. 1842 (1991). Even the threat of such litigation can have a devastating effect on a peer review participant's willingness to take part in peer review, because confidential records may be discoverable and participants may face treble damages for conduct rarely covered by insurance. Robert S. Adler, *Stalking The Rogue Physician: An Analysis Of The Health Care Quality Improvement Act*, 28 Am. Bus. L.J. 683, 698 (1991); *see Marrese v. Interqual, Inc.*, 748 F.2d 373, 391 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

Concerned that the increasing number of physicians' antitrust lawsuits was stifling the peer review process, Congress enacted the HCQIA in 1986, giving incentives and protection to peer review participants. § 11101(4), (5). The Courts of Appeals that have interpreted the Act – including the Court below – have unanimously acknowledged that this was its purpose. (Pet. App. 11a); *accord Bryan v. James E. Holmes Regional Medical Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994); *Hancock v. Blue Cross-Blue Shield of Kansas, Inc.*, 21 F.3d 373, 374 (10th Cir. 1994); *Manion v. Evans*, 986 F.2d 1036, 1041 (6th Cir.), *cert. denied*, 114 S. Ct. 71 (1993); *Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir. 1992); *Lie v. St. Joseph's Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992); *see also Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054, 1061 (E.D.Cal. 1992), *aff'd*, 29 F.3d 1439 (9th Cir. 1994).

To encourage peer review, Congress conferred immunity on peer review participants when an action has been taken against a physician reasonably and in furtherance

of patient care. §§ 11101-15; *see Bryan*, 33 F.3d at 1321; *Austin*, 979 F.2d at 733. In general such action must be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Section 11112(a). These criteria are presumed satisfied unless the plaintiff rebuts the presumption by a preponderance of the evidence. *Id.*; *Bryan*, 33 F.3d at 1333; Pet. App. 13a.

Petitioner claims there is a conflict among the circuits, contending that the Court below "ignored" the first three elements of the section 11112(a) analysis and based its decision only on the fourth. (Pet. 16) He relies on the following passage from the Court's opinion:

> The rebuttable presumption 'creates a somewhat unusual standard' of review for summary judgment because the 'inquiry focuses on whether [the plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts.' (Pet. App. 13a, *quoting Austin*, 979 F.2d at 734)

Petitioner contends that the Court of Appeals' decision here conflicts with the Eleventh Circuit's analysis in *Bryan*, 33 F.3d 1318, and the Ninth Circuit's analysis in

Austin, 979 F.2d 728, both of which required the defendant to satisfy all four elements of the immunity analysis. (Pet. 17)

But petitioner's argument stems from a faulty premise. The Court below did not ignore the first three immunity elements, but analyzed each and properly applied rebuttable presumptions to them. It noted that Good Samaritan began reviewing petitioner after California's Board of Medical Quality Assurance notified it that petitioner's privileges had been revoked at another hospital, that the peer review participants at Good Samaritan found that petitioner's treatment of patients was inadequate, and that petitioner never challenged the substance of the reviewers' findings. Thus, the Court of Appeals concluded, petitioner could not rebut section 11112(a)(1)'s presumption that the peer reviewers "would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients." (Pet. App. 13a, *citing Austin*, 979 F.2d at 734 (internal quotations omitted)). In similar fashion, the Court of Appeals analyzed Good Samaritan's investigation and hearing procedures and concluded that petitioner could not rebut the presumptions that "the termination of his staff privileges was made after a reasonable effort to obtain the facts" and that "the procedures were adequate." (Pet. App. 14a-16a) Only then did the Court of Appeals conclude under the fourth element that Good Samaritan reasonably believed its action was warranted and that it was entitled to immunity and summary judgment. (*Id.* at 17a)

Thus, the Court of Appeals paid proper attention to each immunity element and found that petitioner did not rebut the presumption that Good Samaritan had satisfied them. That analysis is in accord with *Bryan*, 31 F.3d at 1334-37. There, the Eleventh Circuit – using the same review standard applicable on review of a summary judgment – held that the district court should have granted

the defendants' motion for a directed verdict on HCQIA immunity, reasoning that no reasonable jury could conclude that the defendants' actions fell outside the scope of each of the immunity elements. *Id.* at 1333-34. That is the same analytical path by which the Court below affirmed summary judgment. That the Court below articulated its review standard in terms of only the fourth immunity element is a distinction without a difference. (*See* Pet.App. 13a) Like *Bryan*, the Court below applied that standard in its analysis of *each* of the four immunity elements. Accordingly, there is no conflict.

Nor is there any conflict over the interpretation of the "adequate procedures" immunity element. A health care provider is entitled to immunity if it meets the other section 11112(a) requirements and gives the physician "adequate notice and hearing procedures . . . or . . . such other procedures as are fair to the physician under the circumstances." § 11112(a)(3). Section 11112(b)(3) enumerates "safe harbor" hearing procedures that in every case will entitle a health care provider to immunity. However, the statute also states that a provider's failure to follow those procedures "shall not, in itself, constitute failure to meet" the fair hearing requirement. § 11112(b)(3); Pet. App. 58a-60a. Not surprisingly, the case law uniformly holds that Congress meant what it said. *Bryan*, 33 F.3d at 1323, 1335-36; Pet. App. 11a-12a n.5, 14a. For this reason, the determinative inquiry is always whether the procedures were "adequate." *Fobbs*, 789 F. Supp. at 1068; Pet. App. 14a.

Petitioner concedes "[f]or the sake of a minimal rights discussion" that a health care provider may afford physicians either the procedures enumerated in section 11112(b) or other "fair" procedures. (Pet. 15, n.15) However, he argues that these "other" fair procedures merely "explain" the meaning of "adequate procedure" in section 11112(a)(3) such that a health care provider is not entitled to immunity unless it afforded the physician the

precise procedures spelled out in section 11112(b). (Pet. 15, n.15, *see also* Pet. 12-15) Petitioner cites no authority for his argument, because none exists. Although the *Austin* Court of Appeals stated that defendants seeking immunity must "satisf[y] § 11112(b)'s requirement of adequate notice and hearing" [*Austin*, 979 F.2d at 733], as the Court of Appeals here explained, because "adequate procedure" was not at issue in *Austin*, that statement was dicta to the extent it could be read as requiring a defendant to satisfy section 11112(b)'s terms in every instance. (Pet. App. 11a-12a, n.5) Thus, *Austin* does not support petitioner's position, and he can point to no decision that does.

The "conflict" in the interpretation of the Act that petitioner wants this Court to resolve is nonexistent. On this ground there is no basis for review.

2. The Courts Of Appeals Are Not In Conflict Over The Summary Judgment Procedure In HCQIA Immunity Cases

Petitioner contends that the Court "departed from . . . traditional [Federal] Rule [of Civil Procedure] 56(e) analysis" by not affording him the benefit of all reasonable inferences. (Pet. 17) Combining this argument with his claim that the Court of Appeals improperly skipped elements of the immunity analysis, petitioner contends that the Court of Appeals did not conduct a thorough analysis of the evidence petitioner offered in opposition to Good Samaritan's summary judgment motion.

Once again, petitioner's premise is faulty. The Court of Appeals' opinion reflects a painstaking review of the evidence petitioner offered to rebut Good Samaritan's claim of immunity. Rather than "ignoring" that evidence or denying petitioner reasonable inferences, the Court below found that his evidence would not permit a jury to

find that he overcame by a preponderance of the evidence the presumption that Good Samaritan's actions met each immunity element [Pet. App. 13a-17a] – *i.e.*, that his evidence did not create a genuine, material factual issue on any of the ingredients in the immunity calculus. That result was correct under generally applicable summary judgment principles and it was in accord with other decisions that have interpreted the Act. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bryan*, 33 F.3d at 1334-37; *Austin*, 979 F.2d at 733-35; *Fobbs*, 789 F. Supp. at 1061.

As to the first and second immunity elements, petitioner argued in the Court of Appeals (as he argues here), that Good Samaritan did not initiate the action against him in the reasonable belief that it would further quality health care and that Good Samaritan did not conduct a reasonable investigation. He claimed that because Good Samaritan did not undertake a statistical comparison of his performance with that of other internists to determine which physician was "the worst," the initiation and fact-gathering parts of the process were unlawfully flawed. (Pet. 21, n.18; *see* Summary Judgment AOB at 16, 23, 35-36, 44-45, 49) To support this claim, petitioner argued in both courts below that such comparison surveys are *required* components of peer review. (Summary Judgment AOB at 23, 35-36, 44; SER 411-412; CR 88; CR 53 at 22-23; *see* Pet. App. 52a)

Both the district court and Court of Appeals properly rejected this argument. (Pet. App. 14a, 39a) The Court of Appeals held that a hospital need not obtain or analyze comparison data regarding other physicians' performance before disciplining one of its staff physicians who has performed in an incompetent manner and endangered patient safety. (Pet. App. 14a); *see Morgenstern v. Wilson*, 133 F.R.D. 139, 142 (D. Neb. 1990); *Williams v. Kleaveland*, No. C 78-647, 1983 WL 1844, *25 (W.D. Mich. Jan. 27, 1983); *Glover v. Board of Medical Quality Assur.*, 231

Cal. App. 3d 203, 208-09 (1991). It would be absurd and unwise to require a hospital to undertake the Herculean task of reviewing and comparing the performance of each staff physician each time it sought to take adverse action against an incompetent one. *Cf. Gill v. Mercy Hosp.*, 199 Cal. App. 3d 889, 908, *cert. denied*, 488 U.S. 892 (1988). On this point there is no basis for review.[2]

As to Good Samaritan's effort to obtain the facts, petitioner recycles his claims that "outside reviewers" were required to review petitioner's performance and that Good Samaritan "suppressed" evidence favorable to him. (Pet. 18-21, citing *Austin v. McNamara*, 731 F. Supp. 934, 936 (C.D. Cal. 1990), *aff'd*, 979 F.2d 728 (9th Cir. 1992); *Fobbs*, 789 F. Supp. 1054, and *Islami v. Covenant Medical Ctr., Inc.*, 822 F. Supp. 1361, 1380 (N.D. Iowa 1992); Pet. App. 51a, 54a) Neither claim is a basis for granting certiorari. None of the decisions petitioner cites holds that immunity depends on an "outside" review that corroborates a health care provider's findings. Nor was favorable evidence – a purported nurse's "eyewitness" report and an outside consultant's report – improperly "suppressed." Petitioner had no right to the "eyewitness" report as it was attorney-client privileged, and he could have obtained the outside consultant's report merely by asking his own consultant for it. *Sierra Vista Hosp. v. Superior Court*, 248 Cal. App. 2d 359, 363, 369 (1967); *see*

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[2] Petitioner suggests that Good Samaritan acted improperly by failing to comply with the magistrate judge's order compelling production of comparison evidence and alleged "audits" of Good Samaritan's cardiology division. (Pet. 21, n.18) Good Samaritan timely moved the district court for reconsideration of that order soon after it was issued. (CR 71, 72, 73; SER 403-06) The reconsideration request was pending when the district court granted summary judgment. That judgment effectively rendered the reconsideration request and magistrate judge's order moot.

ER 536-37. The Court of Appeals properly rejected any claim that Good Samaritan failed to make reasonable efforts to obtain the facts.

Petitioner's next argument as to why Good Samaritan should not be entitled to immunity centered on the supposed lack of fair hearing procedures afforded him during the peer review process.[3] The Court of Appeals

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[3] Petitioner has "catalogued" his list of alleged "unfair peer review acts" in his Appendix F. That appendix is an attempt to offer further argument when he has exhausted his page limit, and for that reason alone the Court should disregard it. S. Ct. R. 24.3. In any event, the claims are meritless. For example, petitioner accuses Good Samaritan of imposing an "upside down" burden of proof at the peer review hearings. (Pet. App. 55a) But the burden of proof complied with the law in effect at the time – that the medical staff make a substantial showing to support the charges. *Anton*, 19 Cal. 3d at 828-30; *see also Rosenblit v. Superior Court*, 231 Cal. App. 3d 1434, 1449 (1991); *Gill*, 199 Cal. App. 3d at 905; *see* SER 260 ¶ 3.12-1.6, 267 ¶ 3.13.2. Although a different burden was enacted into state law effective January 1, 1990 [Cal. Bus. & Prof. Code § 809, enacted by Cal. Stats. 1989, c. 336, § 2], this change in the law did not affect the hearing here, which occurred before that date. In any event, it is hard to understand how petitioner was prejudiced by the burden that did apply, since the hearing panel found in his favor. *See Anton*, 19 Cal. 3d at 826.

Another example of a meritless claim is that petitioner's counsel was denied the opportunity to cross examine witnesses and was relegated to the role of a "potted plant" at the hearings. (Pet. 13; Pet. App. 54a) But California law does not give a physician the unfettered right to be represented by counsel in a peer review proceeding. *Gill*, 199 Cal. App. 3d at 901-02; *accord Anton*, 19 Cal. 3d at 827; *see* Cal. Bus. & Prof. Code § 809.3(c). Accordingly, Good Samaritan's bylaws limited an attorney's role at such hearings to pointing out procedural errors and advising the client. (SER 260 at ¶ 3.12-1.3) Here, both petitioner's physician representative, Dr. Douville, and his attorney attended the hearings. (SER 221) Dr. Douville cross-

properly rejected this claim as well, finding the procedures adequate. There is no reason to review that decision.

Each of the nine days of peer review hearings was transcribed by a court reporter. (*See* SER 1-168) Petitioner's counsel attended the hearings, where petitioner was represented by a physician-spokesperson. (SER 2, 221) Seven physicians sat on the hearing panel and were advised by counsel. (SER 2-32, 220-21) The panel's counsel questioned each panel member in detail concerning possible bias (including patient referrals and financial interest in the outcome of the proceedings); two ultimately recused themselves (including the "patient of [respondent] Dr. Ricks" identified at Pet. App. 53a, who became an alternate panel member). (SER 6-11, 18, 21-32, 220; *see* ER 581) The panel disallowed petitioner's counsel's voir dire questions as irrelevant to bias or improper attempts to obtain discovery. (SER 11-14, 34, 389-91)[4]

At the hearing, petitioner introduced 22 exhibits and had access to all evidence the medical staff introduced against him. (SER 12, 377-78) Petitioner testified on his own behalf and called one expert witness. His physician

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examined witnesses – as the bylaws permitted – and even made it clear that petitioner's counsel should not interrupt. (SER 264 at ¶ 3.12-2.7, 396) Counsel was permitted to advise Dr. Douville as to any matter the witnesses raised. Neither federal nor state law entitled petitioner to have *both* counsel and Dr. Douville cross-examine. Accordingly, the limits placed on counsel were appropriate.

[4] Examples of these excluded voir dire questions included inquiries about panel members' "personal non-medical business-mutual investments" and their social relationships with Good Samaritan staff, and whether the panel members thought "ideal standards of perfection" should govern privileges issues. (*Id.*)

representative cross-examined all four medical staff witnesses. (ER 230, *see* SER 3, 52, 68, 124) After the hearings, the panel rendered a written decision. (SER 218-27) On appeal to the Board of Trustees, petitioner submitted a written statement and was represented by counsel. (SER 169-217, 230, 233-35, 373-74) Petitioner's counsel conducted extensive voir dire of the Board members; two recused themselves because of previous involvement with petitioner or his patients. (SER 176-205, 209-10A) Several other members to whom counsel objected were permitted to serve because they were neither biased nor prejudiced. (SER 205-09; 210A-10B, 214, 231-32) After listening to both sides' arguments, the Board rendered a unanimous written decision concluding that, given petitioner's repeated substandard treatment of patients, safety concerns required denial of petitioner's reappointment to the medical staff. (SER 238-41, 247-48)

Despite this impressive list of procedures, petitioner claims – as he has throughout this case – that the procedures were inadequate to entitle Good Samaritan to immunity. The Court of Appeals carefully considered and rejected each of these claimed "procedural defects," noting that the Act does not require peer review proceedings to "look like regular trials in a court of law" to entitle a provider to immunity. (Pet. App. 16a) Rather, the Court concluded, Good Samaritan's procedures either met all the "safe harbor" requirements of section 11112(b) or came so close that no reasonable jury could find petitioner rebutted the presumption that Good Samaritan's procedures were adequate. *Id.*; Pet. App. 16a.[5]

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[5] Although none of petitioner's procedural objections has merit, one deserves rejoinder because it is particularly misleading and unfair. Petitioner argues that respondent Keith Bartel, a cousin of one of petitioner's cardiologist colleagues at Good Samaritan, should not have acted as the hearing panel's "law officer," making "rulings" against petitioner. (Pet. at 12, 19-20)

Petitioner has not shown, because he cannot, how the Court of Appeals erred in reaching that conclusion, let alone that any such error warrants this Court's intervention. Although he contends that Good Samaritan's purportedly flawed procedures showed its lack of "good faith," he never explains how good faith or its absence is relevant to immunity. (Pet. 20, *citing Harris v. Bellin Mem. Hosp.*, 13 F.3d 1082, 1087 (7th Cir. 1994)) That is not surprising, because it is not. Indeed, the three courts of appeals that have examined this issue have agreed that section 11112(a)'s standards are objective and that good faith or its absence has nothing to do with whether a physician was afforded fair peer review. *Bryan*, 33 F.3d at 1323; *Austin*, 979 F.2d at 733; *see* Pet. App. 13a.

Nor should the Court grant certiorari to "define" the peer review "hearing and appeal procedures" that entitle a health care provider to immunity. (Pet. 30) First, as the Court of Appeals found, section 11112(b) – which defines the minimum procedures required for immunity – is not ambiguous. (Pet. App. 18a) While the Secretary of Health and Human Services has not yet issued regulations concerning the required procedures (as she is permitted to do under § 11114 [*see* Pet. App. 61a]), the lower courts have had no trouble applying the Act's criteria. Indeed, petitioner has identified no conflicts regarding the meaning of the section 11112(b) requirements or what procedures satisfy the "adequacy" standard under section 11112(a)(3) when a provider has not entered the "safe harbor" of

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Mr. Bartel was the legal adviser to the hearing officer and to the panel. The hearing officer, not he, presided over the hearing, and the panel, not he, made the decision. (SER 220, 227, 380-81) Furthermore, Mr. Bartel saw his cousin only once in the 20 years preceding the hearing. (SER 245) None of this provided any reason for his recusal. *Rhee v. El Camino Hosp. Dist.*, 201 Cal. App. 3d 477, 493-94 (1988).

section 11112(b). The existing case law provides an adequate framework with which the lower courts are able to dispose of cases in a uniform fashion, a fact that shows that this Court's intervention is not required. *Compare Islami*, 822 F. Supp. at 1373, 1377, 1379 (denying summary judgment on immunity because hospital did not provide an impartial hearing panel or a full record of the proceedings and denied the physician the opportunity to cross-examine witnesses) *with* Pet. App. 13a-17a (summary judgment proper because all Act's requirements met).

In any event, petitioner is not really asking the Court to *interpret* what Congress stated to be the hallmarks of fair procedure, but to rewrite the Act to conform to his particular vision of what the Act ought to say. This Court should decline the invitation. *In re Blackwell*, 115 B.R. 86, 88-89 (Bankr. W.D. Va. 1990); *see Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1332 (5th Cir. 1976).

In sum, the Court of Appeals properly concluded that petitioner had no evidence to rebut the Act's immunity presumptions and that the district court properly granted Good Samaritan summary judgment. That decision falls squarely in line with other Court of Appeals' decisions, both as to immunity and summary judgment standards. There is no reason to grant the petition on the basis of any purported "conflict."

B. The Petition Raises No Other Important Question Of Federal Law

Petitioner's remaining claims concern the district court's fees and costs award against petitioner and the Court of Appeals' fees and costs award against his counsel. None of the claims raises an issue of federal importance.

1. The Petition Raises No Important Question Of Federal Law Regarding An Immune Defendant's Entitlement To Fees And Costs In A Frivolous Case Disposed Of On HCQIA Immunity Grounds

When Congress sought to promote peer review by giving immunity to health care providers who participate in a bona fide peer review process, it also concluded that immunity alone would not deter meritless suits by disaffected physicians. Congress therefore added a provision mandating an award of reasonable attorneys' fees and costs to defendants who "substantially prevail" in such actions if the plaintiff's claims or the conduct of the litigation were "frivolous, unreasonable, without foundation, or in bad faith." § 11113; *see Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992); *Farr v. Healtheast, Inc.*, No. CIV. A. 91-6960, 1993 WL 220680, at *13 (E.D. Pa. Jun. 9, 1993); *Wei v. Bodner*, No. CIV. 89-1137, 1992 WL 165860, at *2 (D.N.J. Apr. 8), *aff'd*, 983 F.2d 1054 (3d Cir. 1992); (Pet. App. 17a). This fee- and cost-shifting provision serves the Act's overall purpose by reducing the economic risk of participating in peer review.

Section 11113 was modeled on similar federal statutes (such as Title VII and 42 U.S.C. § 1988), that award fees to the "prevailing party" where the lawsuit was frivolous, unreasonable, without foundation, or in bad faith. 132 Cong. Rec. at H11591 (daily ed. Oct. 17, 1986); H.R. Conf. Rep. No. 1044, 98th Cong., 2d Sess. 15 (1984), *reprinted in* 1984 U.S.C.C.A.N., 3131, 3140; *see Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2, 433 n.7 (1983); *see also* Fed. R. Civ. P. 11; *Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1422 (9th Cir. 1988). Under Title VII, a claim is "frivolous" or "without foundation" if it is factually baseless or groundless. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421-22 (1978). Similarly, under Fed. R. Civ. P. 11, a "frivolous" claim is one made without adequate inquiry into the supporting facts or law. *Townsend v.*

Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 n.7 (9th Cir. 1986). The determination whether a plaintiff's claims or conduct meet the criteria for a fees and costs shift under section 11113 lies within the district court's discretion and will not be disturbed absent a finding of abuse. *Johnson*, 964 F.2d at 123-24, *citing Christiansburg*, 434 U.S. at 421; Pet. App. 18a.

The Court of Appeals upheld the district court's fees and costs award and its findings that petitioner's claims were "at best without foundation, and at worst frivolous," and that his conduct of the litigation was "aggressive[ ], and, at times, inappropriate[ ]." (Pet. App. 18a, 48a) Despite petitioner's contentions (Pet. 22-23), neither decision below constitutes such a "depart[ure] from the accepted and usual course of judicial proceedings" as to warrant this Court's "power of supervision." S. Ct. R. 10.1(a).

The courts below based the fee award on several grounds. First, a minimal inquiry would have shown that Good Samaritan was immune under the Act because it met the section 11112(a) standards. As the Court of Appeals noted, because the statute clearly states the fair procedure and reasonableness immunity standards, "it is difficult to argue the statute was ambiguous." (Pet. App. 18a) Thus, petitioner should have known that his lawsuit would fail.

Second, even if petitioner could have rebutted the immunity presumption, he still had no evidence to suggest that Good Samaritan had engaged in a conspiracy or other conduct in restraint of trade that rose to the level of an antitrust violation. (*Id.*) Rather, petitioner had only "the accusations of [his] counsel," which primarily centered on the same laundry list of purported "procedural defects" that he claimed deprived Good Samaritan of immunity. (Pet. App. 47a ["the substance of [petitioner's] entire case revolved around that one issue [lack of due

process during peer review]"]; Pet. App. 18a ["At best, [petitioner] pointed out some procedural defects in the hearing process."]). Because the peer review process had none of the purported defects petitioner claimed, those "defects" could obviously not support an antitrust violation.

Petitioner faults the courts below for appearing to require "direct evidence" of a conspiracy, which is not required under the antitrust laws. (Pet. 22) But as the Court of Appeals noted, the district court was not using that phrase in its literal or technical sense. (Pet. App. 18a) And, even in this Court, the primary "inference evidence" petitioner offers to support his conspiracy theory are the same supposed "procedural defects" that he said should have defeated immunity. (Pet. 23; *see also* Pet. 20)[6] Accordingly, the courts below correctly found that petitioner's claims lacked foundation.

Finally, petitioner's frivolous conduct of the litigation amply supported the fee award. (Pet. App. 17a-18a, 48a) His unreasonable and harassing discovery requests, his repeated filing of improper and unauthorized documents, his uncooperative litigation posture, and his baseless assertions that Good Samaritan had engaged in improper conduct all supported that conclusion. (*See* Fees and Costs AB at 6-7, 21-23; Sanctions AB at 32-33; and record

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[6] Petitioner claims that evidence of a "new heart clinic costing $1.1 million" supports his "concerted action" theory. (Pet. 23) But Petitioner does not explain how or why the existence of that clinic permits an inference of conspiracy. Nor does petitioner's allegation that Good Samaritan purchased Mission Oaks Hospital to "enlarge" its power so it could then "bar[ ]" him from practicing there support his antitrust claims. (*See* ER 24-25 ¶¶ 30-32; *see* Pet. 7) After Good Samaritan acquired Mission Oaks, the medical staff was dissolved and petitioner was invited to reapply to the newly-reconstituted staff. He declined. (ER 616-17; SER 416)

citations therein); *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470, 1477 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986); *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir. 1985); *see Farr*, 1993 WL 220680, at *14).[7]

Nor does petitioner's claim that the fees and costs award was too high furnish a basis for granting his petition. (Pet. 23-24) The magistrate judge to whom the district court referred calculation of the fees and costs conducted a careful *in camera* review of unredacted monthly billing statements that showed daily time entries broken down by task, in six-minute increments. (ER 1370-71, 1538, 1545; *see* ER 1372-95; CR 137 Exh. A)[8] After a "painstaking" review, the magistrate judge reduced the amount claimed by approximately six percent and recommended that the district court award the remainder to Good Samaritan, which it did. (ER 1537-45, 1564, 1569-71, 1573-74)[9]

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[7] One of the more egregious liberties petitioner takes with the record is that respondent Dr. Nagel "killed" a patient and then tried to "coverup" the "killing" by avoiding an autopsy. (Pet. App. 52a) Petitioner's own evidence shows that the patient died during a catheterization procedure, that the case was reviewed as part of Good Samaritan's quality assurance program, and that Dr. Nagel properly reported the death to the coroner. (ER 21, 205, 359, 560, 1181-82 & n. 6; SER 242, 527-28, 537-41)

[8] Petitioner claims that the magistrate judge reviewed only the "attorney recap" portion of the billing statements. (Pet. 24) Not so. Good Samaritan originally submitted monthly invoices showing hourly rates and total hours billed by attorneys and others [ER 1209, 1220-32], but later submitted full, unredacted computerized billing statements. (ER 1370-71)

[9] The fees and costs awarded were actually 13 and 29 percent less, respectively, than Good Samaritan had incurred by the date it submitted the last billing statements to the magistrate judge. She apparently based her award on billing statements for

Given the thoroughness of the process and the result – both of which the Court of Appeals endorsed – it makes no sense for this Court to review the fees and costs issue. That is particularly true given that all petitioner can offer is the claim that the award was too high because too much lawyer time was spent litigating the case – a claim that this Court must compare to contrary case law. *See Frantz v. U.S. Powerlifting Fed'n*, 836 F.2d 1063, 1065 (7th Cir. 1987) (antitrust suits are "easy to file, yet notoriously costly to defend"); *Unioil, Inc. v. E. F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986) (where complaint threatens to impose massive liability on multiple defendants, substantial fees are reasonable), *cert. denied*, 484 U.S. 822 (1987); *see also Wei*, 1992 WL 165860, at *6-7 (awarding approximately $459,000 in attorneys' fees under § 11113 for 2,797 hours reasonably spent). Moreover, petitioner has only his own counsel to blame for the amount of the award, as his frivolous litigation tactics and unreasonable discovery requests were in large part the reason why the fees and costs climbed so high. *See Frank Music Corp. v. M.G.M., Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); *Copeland v. Marshall*, 641 F.2d 880, 904 & n.53 (D.C. Cir. 1980).

Furthermore, Petitioner was not deprived of an adequate opportunity to contest the claimed fees. Petitioner received copies of the detailed billing statements, with attorney-client privileged information redacted as the law permits. *See In re Horn*, 976 F.2d 1314, 1317-18 (9th Cir. 1992); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982); (CR 137 Exh. A, 139; ER 1372-95). The magistrate judge's *in camera* review of the

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fees and costs incurred up to the date of the district court's grant of summary judgment, and excluded fees and costs for later proceedings. (ER 1209, 1370, 1538-39, 1570-71; SER 559 & n.2)

unredacted billing statements was not a denial of "due process," but was a necessary step to protect privileged information. *FSLIC v. Ferm*, 909 F.2d 372, 374-75 (9th Cir. 1990); *In re Rheuban*, 121 B.R. 368, 384 (Bankr. C.D. Cal. 1990); *see* N.D. Cal. R. 270-2. And, because Good Samaritan was not required to submit the handwritten daily time entries of its attorneys, the district court properly declined to enforce petitioner's subpoena requesting such records. (SER 499-513) *See, e.g., Davis v. City & County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), *citing Hensley*, 461 U.S. at 437 n.2, *vacated in part on other grounds*, 984 F.2d 345 (1993); *Frank Music*, 886 F.2d at 1557; *Dennis*, 611 F.2d at 1308.

Finally, the award of fees here will not "chill" legitimate advocacy, as petitioner suggests. (Pet. 24) The district court awarded fees precisely because it concluded that petitioner's claims and tactics were *not* legitimate. (Pet. App. 46a-48a) The Court of Appeals' affirmance of that award together with its own award of frivolous appeal sanctions confirms this conclusion. (Pet. App. 17a-18a, 20a-22a)

Rather than chilling legitimate advocacy, the fees and costs award here promotes the Act's purpose by causing disciplined physicians and their attorneys to think twice before filing an expensive, time-consuming, and wholly meritless lawsuit against peer reviewers. *See Ezpeleta v. Sisters of Mercy Hosp.*, 800 F.2d 119, 122 (7th Cir. 1986). That was precisely what the district court found, and the Court of Appeals' affirmance of the judgment reflects its agreement with that reasoning. (Pet. App. 48a) There is no basis for granting the petition on this ground.

2. The Petition Raises No Important Issue Regarding The Court Of Appeals' Decision To Sanction Petitioner's Counsel For Pursuing A Frivolous Appeal

Petitioner contends the Court of Appeals erred in ordering his counsel to pay Good Samaritan its appellate attorneys' fees and costs under Federal Rule of Appellate Procedure 38. Even if this Court has jurisdiction over this claim [*see supra* at 2], the issue does not warrant review.

a. The Court Of Appeals Properly Found Counsel's Arguments Wholly Without Merit And Correctly Exercised Its Discretion To Impose Frivolous Appeal Sanctions On Petitioner's Counsel

Federal Rule of Appellate Procedure 38 affords the courts of appeals "plenary discretion" to award an appellee attorneys' fees for having to defend a frivolous appeal. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987). An appeal is "frivolous" when the result is obvious or the arguments of error are wholly without merit. *In re Marquam Inv. Corp.*, 959 F.2d 800, 801 (9th Cir.), *cert. denied*, 113 S. Ct. 676 (1992); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 444 (9th Cir. 1991). Here, the Court of Appeals found the appeal was "frivolous, unreasonable, and without foundation," and "wholly without merit," and that it "wasted [the] court's time" and "forced Good Samaritan to incur great expense." (Pet. App. 21a-22a) The Court based those conclusions on two factors relating to the merits of petitioner's arguments: (1) the law clearly entitled Good Samaritan to immunity and (2) petitioner had no evidence to support his antitrust claims. (*Id.*) The Court further decided that petitioner's counsel rather than his client should be assessed the fees and costs, because counsel, not petitioner, was "truly at fault in pursuing this meritless

claim." (*Id.* at 21a) These conclusions represent a proper exercise of the Court of Appeals' discretion and present no issue worthy of review.

Petitioner claims that the Court erroneously sanctioned his counsel for arguing that immunity depended on "various state law decisions and professional guidelines" rather than the "text of the HCQIA." In his view, because counsel was merely arguing for an extension, modification, or reversal of existing law, sanctions were improper. (Pet. 25; Pet. App. 21a) This claim lacks merit.

In both courts below, petitioner argued that Good Samaritan was not immune because it had not complied with various state laws and industry guidelines, such as the burden of proof and voir dire requirements of California Business & Professions Code Section 809 and the impartial investigation and unlimited cross-examination guidelines promulgated by the American Medical Association, the California Medical Association, and the Healthcare Committee of the American Bar Association. (Summary Judgment AOB 8, 36-37, 41-43) But the HCQIA's legislative history is unambiguous in stating that if a health care provider satisfies the Act's immunity requirements, state law is irrelevant. *See* H.R. Rep. 903, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393; 132 Cong. Rec. at H11590; 135 Cong. Rec. E4137, E4138 (daily ed. Dec. 11, 1989); *cf. Fobbs*, 798 F. Supp. at 789. That same logic applies to industry guidelines, which do not even have the force of state law.

Accordingly, petitioner's claim that he was merely arguing in "good faith" for an extension, modification or reversal of existing law is misplaced. (*See* Pet. 29) He should have known that federal courts do not "modify" Congress's express language or insert requirements that it intentionally omitted. *In re Blackwell*, 115 B.R. at 88-89; *see Doski*, 539 F.2d at 1332. The Court of Appeals correctly exercised its discretion on this ground.

The Court of Appeals also found that because petitioner had no evidence to support his claims, Good Samaritan was clearly entitled to immunity and any appeal was doomed. (Pet. App. 21a-22a) That, too, was a proper exercise of discretion. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 653-54 (9th Cir. 1988) (appeal of dismissal of claims which were clearly barred is frivolous); *accord Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984).

The Court of Appeals further based its Fed. R. App. P. 38 sanction on the frivolousness of counsel's Fed. R. Civ. P. 11 sanctions appeal – an appeal that it found "so frivolous that one need only recite his claims to recognize their absurdity." (Pet. App. 21a) In that appeal, counsel contested a $2,000 sanction imposed for filing – without reading – a "renoticed" motion to "correct" the district court's fees and costs order (he said he thought it was a notice of appeal), arguing that the filing was merely a "stupid mistake." (Pet. App. 19a-20a, ER 1016) Given Fed. R. Civ. P. 11's clear "read-before-filing" command and voluminous Ninth Circuit rejection of the "pure heart but empty head" defense, the Court of Appeals found that appeal without any arguable merit. *Id.*; *e.g.*, *Lloyd v. Schlag*, 884 F.2d 409, 413 (9th Cir. 1989); *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987); *Zaldivar*, 780 F.2d at 830. That finding as well was an appropriate exercise of discretion.

Petitioner claims that his appeals were not frivolous because no published decision had yet interpreted the Act's fair procedure requirements. (Pet. 27) But an absence of appellate interpretation alone does not justify an appeal where – as here – no reasonable attorney would have appealed and argued that the text of the HCQIA does not mean what it says. While some cases may present arguable questions about a health care provider's compliance with fair hearing procedure requirements [*e.g.*, *Islami*, 822 F. Supp. at 1377-79 (denying immunity

because hospital did not follow its own bylaws, which track the Act's standards)], this was not one of them.

Petitioner also asserts that the Court of Appeals' decision to hear oral argument demonstrates that the appeal was not frivolous. (Pet. 27-28) But while Fed. R. App. P. 34(a)(1) and Ninth Circuit Rule 34-4(a) *permitted* the Court of Appeals to dispense with oral argument if all three judges on the panel concluded it was frivolous, the Court was not *required* to do so. Surely in setting oral argument, the Court of Appeals did not "waive" its right to impose frivolous appeal sanctions.

Nor did the Court of Appeals err in deciding to impose the sanctions on petitioner's counsel. Finding it was unclear whether section 11113 authorized an award of fees against counsel, the court awarded them under Fed. R. App. P. 38. (Pet. App. 21a-22a, *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 & n.9 (1980)). That decision was consistent with several other decisions holding that Fed. R. App. P. 38 sanctions may be assessed against counsel. *E.g., In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989); *Coghlan v. Starkey*, 852 F.2d 806, 818 (5th Cir. 1988); *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987). After all, imposing fees on counsel more effectively fulfills Fed. R. App. P. 38's deterrent purpose, as counsel rather than the client is often in the best position to determine whether to take an appeal. *Cf. In re Becraft*, 885 F.2d at 548-50.

Petitioner nevertheless argues that to saddle counsel with the sanction was improper, given counsel's history "in the front line of the physicians' struggle for due process in hospital hearings." (Pet. 25) No amount of self-perceived White Knight status in this purported "due process struggle" excuses pursuing a totally baseless appeal. Any reasonable attorney – perhaps counsel even more so, given the wealth of his peer review experience –

should have known that the claims on appeal were frivolous because of the clear language of the HCQIA and because Good Samaritan's arguments for immunity, fees, costs, and sanctions were extremely strong. (*See* Pet. App. 21a-22a)

In short, the Fed. R. App. P. 38 sanction was consistent with the Rule's purposes: to penalize the person responsible for taking a frivolous appeal and to compensate Good Samaritan for having to defend the district court's judgment against totally meritless attacks. *See Burlington Northern*, 480 U.S. at 7. The sanctions raise no issue worthy of review.

b. The Court Of Appeals Provided Petitioner's Counsel Adequate Due Process In Imposing Frivolous Appeal Sanctions

Petitioner also seeks certiorari on the ground that Fed. R. App. P. 38 sanctions were imposed without giving his counsel adequate "warning" or "opportunity to protest" the basis for the award. (Pet. 28) This claim also fails to warrant this Court's plenary attention.

After the Court of Appeals filed its opinion, counsel filed fourteen pleadings and one letter protesting the imposition of the frivolous appeal sanctions against him.[10] On several occasions, counsel asked that the Court

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[10] These were: Petition for Rehearing and Request for Rehearing En Banc (Sept. 8, 1994); Request for Proceedings Pursuant to General Order 10.9 (Sept. 8, 1994); Declaration and Memorandum re same (Sept. 8, 1994); Motion For Recusal of merits panel (Sept. 9, 1994); Declaration re same (Sept. 9, 1994); Legal Memorandum re same (Sept. 9, 1994); Petition for Rehearing of Denial of General Order 10.9 Proceedings and Request for Rehearing En Banc (Oct. 18, 1994); Motion for Recusal Regarding Petition for Rehearing of Denial of Motion For Proceedings Under General Order 10.9 (Oct. 18, 1994); Supporting

institute proceedings under Ninth Circuit General Order 10.9 and that the merits panel recuse itself from further proceedings so that there could be "neutral review of this crushing sanction."[11] In these various filings, counsel advanced the same reasons for reversal of the Fed. R. App. P. 38 sanction that petitioner presents here: an alleged lack of notice, the Court's purported misperception regarding counsel's arguments concerning state law fair procedure requirements, and counsel's purported "good faith" belief in the merit of his arguments. Counsel asked the Court of Appeals to vacate the Fed. R. App. P. 38 sanction and "expunge" the offending language from its opinion or to reopen the issue for an order to show cause and further proceedings.

In four separate orders and one letter (dated Oct. 4, 1994, Oct. 5, 1994, Nov. 17, 1994, Dec. 12, 1994, and Feb. 7, 1995), the Court of Appeals denied the Petition for Rehearing, rejected the Request for Rehearing en Banc, and rejected each of counsel's additional requests. (Pet. App. 23a-27a; App. A, B, & C) The Court explained that General Order 10.9 does not require an order to show

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declaration re same (Oct. 18, 1994); Letter requesting that "committee . . . responsible for . . . rules" review the Rule 38 sanction (Nov. 19, 1994); Request for Extraordinary Proceedings and to Recall Mandate (Dec. 12, 1994); Supporting declaration re same (Dec. 12, 1994); Legal memorandum re same (Dec. 12, 1994); and Motion for recusal of merits panel (with 8 exhibits) (Dec. 12, 1994).

[11] General Order 10.9 (App. "D") states that if the court is considering imposing sanctions for frivolous filings, it shall issue an order to show cause and allow the threatened party an opportunity to respond before sanctions are imposed. However, the Order also states that such procedures are *not* required where the opposing party has requested sanctions in a brief or other paper. That was precisely the case here, as Good Samaritan requested that the Court of Appeals award it fees for having to defend the appeal. (Summary Judgment AOB at 48-49)

cause when a party has requested sanctions in a brief, which Good Samaritan had done here. (Pet. App. 25a-27a) Nevertheless, the court reviewed *de novo* the issue of the appropriateness of the Fed. R. App. P. 38 sanction and reaffirmed its decision. (Pet. App. 25a) Furthermore, the merits panel declined to recuse itself because the sanctions issue had been before the full Court as a result of petitioner's first Request for Rehearing en Banc. (Pet. App. 27a) And, it deemed counsel's requests "untimely" and "out of order." (*Id., see also* App. "C") None of these actions even hints at an abuse of discretion, much less affords a basis for certiorari.

Nor is there any merit to petitioner's contention that "no neutrals reviewed the sanction." (Pet. 28) The full court considered the first (September 8) Petition for Rehearing and Suggestion for Rehearing en Banc, in which petitioner raised the Fed. R. App. P. 38 and General Order 10.9 issues. No judge voted to reconsider the judgment. (Pet. App. 27a) And while the full court or judges other than those on the merits panel may not have considered petitioner's various motions [*see* Pet. 28], he offers no authority suggesting that they should have. To the contrary, the merits panel judges were most familiar with the issues in the case, the arguments presented, and the lack of a factual basis for petitioner's claims. They were therefore in the best position to determine whether the appeal was frivolous. To require a different panel of judges to become as familiar with the case merely to review the sanction would be a waste of resources and would unnecessarily prolong this litigation.

Counsel had ample notice that Good Samaritan was seeking fees on appeal and that the Court considered the appeal frivolous. He had an ample opportunity to respond and re-respond to that charge. The Court of Appeals reviewed each of counsel's numerous filings, reconsidered the sanctions *de novo*, and reaffirmed its decision. Nothing in its actions departed from the text of

General Order 10.9 or from the "accepted and usual course of judicial proceedings." S. Ct. R. 10.1(a). Given this impressive record of due process, there is no basis for granting certiorari on the Fed. R. App. P. 38 issue.

CONCLUSION

The Courts of Appeals are not in conflict over the standards that qualify a health care provider for HCQIA immunity. That is because Congress was clear in articulating them and in supplementing that articulation with unambiguous legislative history confirming their "safe harbor" effect. The Court of Appeals applied those criteria correctly, just like courts before and after it. Accordingly, this case presents no important question of federal law. The petition should be denied.

DATED: March 6, 1995

Respectfully submitted,

CROSBY, HEAFEY, ROACH
& MAY
PROFESSIONAL CORPORATION

PAUL D. FOGEL

Attorneys for Respondents
William B. Ricks, et al.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al. Defendants-Appellees.	No. 92-16461 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff, JEROME BERG, Esq., Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-15586 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-16410 D.C. No. CV-91-20368-JW
JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al., Defendants-Appellees.	No. 93-17300 D.C. No. CV-91-20368-JW ORDER (Filed 10/5/94)

Before: FLETCHER, FERGUSON and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing, Judges Fletcher and Trott vote to reject the suggestion for rehearing en banc, Judge Ferguson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

December 12, 1994

Jerome Berg, Esq.
1255 Post Street, Suite 606
San Francisco, CA 94109

RE: Smith v. Ricks, No. 93-17300

Dear Mr. Berg:

The panel of judges in the above case asked me to respond to your letter of November 18, 1994. Please be advised that the request of rehearing en banc from the denial of your motion for a hearing pursuant to General Order § 10.9 was rejected by the panel. General Order § 6.11. There is no procedure for review of sanctions by the Court's Rules Committee or the Chief Judge. Your request to review the file and for an appointment is denied.

Very truly yours,

Cathy A. Catterson
Clerk of Court

CAC/mmb
c: Paul Fogel

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB. 7, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN PHILLIP SMITH, Plaintiff-Appellant, v. WILLIAM B. RICKS, et al. Defendants-Appellees.	No. 93-17300 D. C. No. CV-91-20368-JW ORDER

Before: FLETCHER, FERGUSON, and TROTT, Circuit Judges.

Attorney Berg's request filed December 19, 1994 for extraordinary proceedings and to recall the mandate "for which [to quote his request] no known rule or General Order provides a format" is rejected as inappropriate.

APPENDIX D

Ninth Circuit General Order 10.9

10.9. Sua Sponte Imposition of Sanctions

a. Sanctions Imposed Against Counsel or a Party

Sanctions may be imposed against counsel or a party for conduct that violates the Federal Rules of Appellate Procedure, the Circuit Rules, orders or other instructions of the court, the rules of professional conduct or responsibility in effect where counsel maintains his or her principal office or as authorized by statute. If sanctions appear to be warranted, the following procedures shall apply.

The duty judges may issue an order to show cause that directs a litigant to pay a sanction in the amount determined by the Court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven days from service of the response. Upon review of the response and reply, if any, the judge may deem the order to be discharged or may refer the response to the merits panel or motions panel for an evaluation as to the propriety of sanctions. All dispositions in which orders to show cause have been issued shall specifically address any response or failure to respond to the order.

A motions or merits panel may issue an order to show cause that directs a litigant to pay a sanction in the

amount determined by the court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven days from service of the response. Upon review of the response and reply, if any, the panel may deem the order to be discharged or may impose the sanction. No order to show cause need be issued if a party requests the imposition of sanctions in a motion or brief to which the party opposing sanctions has an opportunity to respond.

FILED
MAR - 6 1995
OFFICE OF THE CLERK

(4)

No. 94-1187

In The

Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

Petitioner,

vs.

WILLIAM B. RICKS M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeal
For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE UNION OF AMERICAN PHYSICIANS AND DENTISTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MARILYN PRESTON, ESQ.
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28 pp

QUESTIONS PRESENTED

1. In interpreting HCQIA, should the courts consider its common-law background? HCQIA loosely outlines the procedural mechanisms for hearings. Conservative industry professionals crafted suggested guidelines for fair procedure.

2. Is public health best protected by ethical peer review, where every doctor is reviewed under the same standards, with equal participation of each physician in each department? This learning/teaching function of peer review elevates the general quality of care at the hospital. It encourages improvement and discourages mediocrity as well as economic waste.

3. Is unethical peer review an earmark of anti-competitive activity?

4. Is impartial outside evaluation standard procedure when an ethical peer review is conducted?

5. Was it frivolous for Dr. Smith to suggest that the procedures followed in his case should be compared to standard industry practices to assess whether the HCQIA's requirement of fair procedure was met?

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Union of American Physicians and Dentists. Constitution, Preamble, 1972 1

I. INTEREST OF *AMICUS CURIAE*

The Union of American Physicians and Dentists ("UAPD") is an independent nationwide trade union of physicians and dentists. Founded in 1972, UAPD represents the professional interests of its members in all practice settings. UAPD's expressed goals are stated in the preamble to its constitution as follows:

> [T]o provide optimum medical care for the people; to insure quality facilities for the provisions of medical care; to enable doctors to give of themselves, unhindered by extraneous forces, for the welfare of their patients . . . (Union of American Physicians and Dentists. Constitution, Preamble, 1972)

As an organization founded to protect the rights of individuals, UAPD has been active in legislative and judicial matters which concern these vital interests. UAPD has appeared as an *amicus* in selected important cases and as a sponsor of legislation which addresses the professional rights of physicians and the public health interest of their patients, the most recent being our sponsorship of California Business and Professions Code § 809, *et seq.*

UAPD's sponsorship of § 809 was based on its assessment that the terms "fair," "reasonable," and "appropriate" in the HCQIA would require years of expensive litigation to develop a common law of appropriate conduct in peer review, hearings, and appeals. Our prediction was optimistic in light of the *Smith* case. A finding that such grossly unfair conduct as we see in *Smith* not only merits qualified immunity under HCQIA but that Dr. Smith was "frivolous" to have contested effective monopolization efforts over heart catheterization in San Jose is a major setback to ethical peer review and a threat to public health.

II. SUMMARY OF FACTS INCLUDING INFORMATION THIS *AMICUS* CAN ADD

A. The Public Health Need for Fair Peer Review Methodology

The facts of an abusive peer review, hearing, and appeal are set-out in detail in Appendix F to the Petition for Certiorari at pages 50a to 56a. They present a case of multi-faceted departures from fair procedure that is commonly expected and usually provided in similar matters.

UAPD is especially concerned about Dr. Smith's documented claim that as to the review he was denied participation in the customary departmental self-examination which is the bedrock of fair peer review.[1] In each hospital, in every department review of each doctor's work by the entire membership of the department is a learning/teaching function of continuing education as well as a control on unnecessary procedures and work that falls below acceptable levels. As Jerome Lackner, MD (the former Secretary of Health for the State of California) has pointed out (E.R. 262), the self-regulating value of these reviews inures to the public benefit, and departures from the usual fully shared peer review practice exposes the public to harm which is not easily addressed – excessive treatment and low quality treatment which does not quite call for sanctions. This court is well aware of the subtle pressure by controlling groups to obtain benefits based upon their coercive power which was exposed in *Summit Health v. Pinhas*, 500 U.S. 322, 111 S.Ct. 1842 (1991) where the controlling group's enrichment machine is reported in terms of kickbacks and unneeded charges all of which are passed on to the public with no corresponding benefit.

The parties and the Court of Appeals failed to highlight the public health need for fair peer review methodology, but that is a driving force behind enactment of the HCQIA. UAPD

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[1] Due to a mix-up Dr. Smith did get one set of his colleagues' records for peer review, and he found a number of substantial errors by them.

hopes that this court will make this a significant focus of its concern for the general benefit of health care in America.

B. The Typical Organization of Medical Staffs

It may be helpful for the court to understand that generally hospital staffs are organized on a departmental basis determined by the nature of the specific care rendered by the doctors. The chair of each department is by reason of that status a member of an executive committee of all the doctors. This group is led by the chief of the medical staff. The natural impulse of such a ruling committee is to support the supplications of component chairmen. If one departmental chief seeks discipline against a member of his department, the other departmental heads tend to go along in the expectation of similar support when they seek a sanction.

Lack of respect for fairness in the review can make one department or a whole hospital a cauldron of abuse in ways that are subtle and not easily relieved until they become so excessive that a public inquiry results.[2] Obviously, the closer all departments in all hospitals adhere to fair standards the less negative impact of abuse affects the public.[3]

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[2] In this case the fully shared system of peer review and careful audits of the orthopaedic and other departments (E.R. 32 to 41 and 374 to 378) stands in contrast to the monopolistic practices of the cardiology and internal medicine departments of the focus hospital.

[3] One example of a double standard in the review is found in the nephrotoxic angiography dye matter. Dr. Smith's competitors called him on the carpet at informal departmental meeting where they claimed he was using harmfully excessive amounts. He returned with the utilization log (kept by cath lab technicians). The log showed the accusers customarily use more than the most Dr. Smith used. That ended the incident. The overusers were not criticized (E.R. 371).
A similar technicians' log of complications in the cath lab (E.R. 28 to 31) was copied by Dr. Smith because it shows his extremely low incidence compared to the accusers. Dr. Marcus testified about this at the JRC (E.R. 99, 229 to 259 and 543).

Comparison audits of a particular procedure are the most evenhanded way to evaluate physician outcomes. the technique is easy to apply. A list of problems common to a procedure is duplicated. A random sample of the cases is pulled by the records librarian. Each member of the department enters data from his *pro rata* share of competitors' charts, and the audit sheets are then combined by the secretarial staff. Sample audit reports from the focus hospital's orthopaedic department are at E.R. 21, 33 to 41 and 357 to 361.

C. The Legal Issue is Not Whether Dr. Smith Practices Good Medicine

UAPD recognizes the reluctance of courts to second-guess professional evaluations among peers. Sophisticated experts can argue the subtle points of patient care in symposia which will boggle even medical professionals.[4] For this reasons, UAPD urges the court to concentrate on the quality and fairness of the procedure rendered in the peer review and hearing process. It is in this realm of due process (fair procedure) that the court is best qualified by training and experience to articulate standards. UAPD is sensitive to the efforts of respondents to raise the specter that Dr. Smith is a bad doctor in an effort to befuddle the issues of fair procedure. They obviously persuaded the Court of Appeals which then short-circuited all the procedural components of the HCQIA. In reviewing the medical cases that court overlooked

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[4] In April, 1993 *Circulation*, a journal published by the American Heart Association, reported that the death rate for women (such as L.W.) having angioplasty is ten times greater than that of men. The significance of such studies to the comparison of Dr. Nagel's death case (of his walk-in patient – a man who died when catheterized inappropriately while in congestive heart failure) with the L.W. case is an issue which may be significant at trial in this matter. Another comparison worth considering is the average 31% rate of physician-caused injury to ICU patients. (See *Crit. Care Med.* Jan. 1993, 440-50). Compare the averages to the few grievances at the focus hospital where Dr. Smith had 1800 patient admissions during his six years on the staff.

Dr. Smith's high level of referrals from other doctors – a factor that points to good quality of care and his extremely low rate of complications in heart catheterization – about one-fifth compared to the average 1% (*Am. J. Surg.* Apr. 1994 375-8). The UAPD is not aware of any of the Informed Consent forms legally required in California before surgical intervention that do not indicate cardiac catheterization is a hazardous procedure with multiple potential severe complications, including death. Contrary to the accusations of substandard care, which the UAPD believes to be a diversionary subterfuge, the 1800 cases cared for by Dr. Smith, with a demonstrated low complication and death rate, strongly supports the notion of Dr. Smith's exemplary practice. Whether Dr. Smith's care was anything but appropriate in the cases cited has never been examined in an antiseptic venue under neutral instruments like those of the justice system. Certainly a procedure as flawed as Dr. Smith has demonstrated here with suppressed exculpatory evidence, a biased fact-finder, an upside-down burden of proof, and a hearing committee under the guidance of a competitor's cousin cannot be accepted as an adequate forum to judge his work.

D. The Effect of Expulsion on an Individual Physician

The loss of practice rights ("privileges") for a single procedure (or greater losses such as illustrated here – total expulsion from a hospital staff) is reported to various registries. Pursuant to 42 U.S.C. § 11133(a)(1) there is the National Registry. A registry is kept by the Federation of State Medical Boards. Additionally, there are state registries (California Business and Professions Code § 803). Records are also kept by medical malpractice insurers. All hospitals consult these registries (as illustrated here by the Good Samaritan references to O'Connor Hospital cases). The career impact of loss of any practice rights is a stain which can never

be washed away.[5] Expulsion from a staff and subsequent registration affects a professional's potential for relocation to another state. Improper use of this system impacts the citizen's right to freedom of movement between the states.

Like defamation, an adverse peer review follows like a shadow. An unjust sanction is a life-long nationwide curse. Certainly the gravity of such a loss necessitates the imposition of maximum procedural safeguards.

E. There is No Standard for Imposition of Sanctions

UAPD's observation of the data derived from cases where restrictions and expulsions have been protested indicates that a large component of those cases reflect unfair imposition of sanctions and a tremendous disparity of sanctions when measured against uniform standards of performance.

The absence of detailed federal peer review and hearing standards is an invitation to spurious accusations. The medical staff structure of the thousands of isolated little hospitals scattered throughout the country which often provide the only service for some procedures within reasonable travel distances creates little local monopolies. The potential for abuse is obvious.

While there are no systematically-gathered statistics, anecdotal evidence reported to UAPD indicates that unfair peer review has not been ended by the HCQIA. In view of UAPD's specific services to its members in peer review matters its receipt of such information is significant evidence that peer review abuse is becoming more common as medicine moves to the ultra competitive environment of managed care.

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[5] Compare criminal law procedures to expunge the record for convicts whose offenses have been expiated. "Expungement of Adjudication Records" 1966 Wash. U.L.Q. 147.

III. SUMMARY OF THE ARGUMENT

Ethical peer review serves the public health interest of society and protects the vested property interest of physicians in their practice rights at the hospital against monopolists. Thorough ethical peer review is a public health necessity; corrupted peer review is a public health detriment.

A structure of ethical peer review requirements and mechanisms for fair hearings and appeals is indicated by the HCQIA but not fully expressed by Congress which intentionally left that job to the Secretary of HHS who declined.

The industry responded with practical guides written by lawyers expert in the field. Most noteworthy is the American Hospital Association's Task Group report because it reflects the views of the very conservative interests who recognize the need for a level of due process which commands respect because it is obviously decent.

Smith rejects these guides as "irrelevant" (footnote 8). In so doing *Smith* presents an extreme departure from the legal history of peer review, the expressed legislative purpose, and the specific language of the HCQIA, especially § 11,112(b)(3).

Smith relied on medical faults alleged by competitors and untested, uncredentialed people. Favorable medical evaluations by Dr. Marcus, a renowned expert, and Dr. Fletcher, a university faculty member, were rejected. This was not justified. Reasonable arguments raised on appeal were condemned as "frivolous."

The opinion below misinterprets the statute and immunizes unfair peer review.

IV. ARGUMENT

A. Highlights of Peer Review Law Before HCQIA

The physician's right to practice his profession in a hospital is central to his livelihood. Control over this valuable right resides in the medical staff organization. The grant and removal of practice rights including the variety of services the

physician is permitted to perform has not been subject to universal standards of fairness.

Most states declined to regulate these rights through legislation before New York enacted Public Health Law § 2801-b in 1972, and few have tried since. (Exceptions include Colorado, New Jersey, Ohio, Pennsylvania, Virginia and Washington. Former Texas Rev.Civ.Stat.Ann. art. 4437f, section 17(c), a 1987 Texas statute which required "procedural due process" for each applicant for medical staff membership, was repealed in 1989.)

For this reason, in the past when disputes over practice rights were fought in the courts great deference was paid to the establishment physicians and scant concern was given to the impact on the public of the system which permits cartelization of hospital medicine. For example, in Illinois, judicial review of private hospital decisions to terminate or curtail existing medical staff privileges was limited by the "rule of non-review" except to determining whether such decisions were rendered in compliance with the hospital's own bylaws. *See Pulido v. St. Joseph Memorial Hosp.*, 547 N.E.2d 1383, 1388 (1989).

In general, judicial review of the denial or curtailment of hospital staff privileges was limited to whether the hospital's decision was made in good faith and on objectively reasonable grounds, whether it was consistent with the public interest, and whether it was supported by sufficient evidence, reasonably related to patient care, in furtherance of a legitimate health-care objective, and not susceptible of arbitrary or discriminatory application. *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal.App.3d 541, 116 Cal.Rptr. 245 (1974); see also *Woodbury v. McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971).

However, traditional limited review does not reach a hospital's internal review, trial, and appeal proceedings.

Unfair review has long been recognized as a problem in hospital staff court cases. The California Supreme Court seventeen years ago in *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465, 484, 131 Cal.Rptr. 90 (1976) observed:

> Our court has long recognized, of course, that the existence of unrestrained authority in hospital boards or professional associations has at times enveloped an arbitrary selectivity that threatened to convert the operating room into the province of an elite clique.

In an *amicus* brief filed on August 15, 1962 in *Willis v. Santa Ana Community Hospital,* 58 Cal.2d 650, 26 Cal.Rptr. 640 (C.A. #268990 at p.21) (1962), the California Medical Association and the California Hospital Association admitted, as emphasized below, that the system of peer review is abused by making malicious accusations against the individual physician:

> Not only do the activities of the organized medical staff of a hospital constitute restraints on competition, but occasionally the activities are carried out for the specified purpose of prohibiting the practice of medicine by one physician. Furthermore, the motivating force behind such action occasionally involves concerted efforts on the part of the members of the committee, or staff, to limit or eliminate the hospital practice of the physician or to create such an economic hardship on the part of the physician that continued practice in the area would be impossible. The aforesaid activities can be carried out with good faith on the part of the members of the staff, yet *acting with malice toward the individual physician* whose conduct is reflecting on standards of patient care or the confidence of the public in the practice of medicine.

The Court of Appeals dissenting opinion, later vindicated by this court, in *Arizona v. Maricopa,* 643 F.2d 553, 565 (9th Cir. 1980); rev. 457 U.S. 332 (1982) noted:

> The health care industry currently does not display significant competitive conditions. . . . It is also undoubtedly true that a major factor has been the active suppression of competition by traditional medical associations. The restraints fostered by

these groups are and should be subject to conventional antitrust scrutiny.

During the last few decades the cost of health care continued to increase as a portion of the domestic product while this medical staff system remained not scrutinized by Congress until 1986 when the Health Care Quality Improvement Act was passed.

HCQIA revitalized the anti-trust judicial remedy while at the same time it tempered access to the courts by establishing an anti-trust immunity and a fee shifting provision to stick the unsuccessful physician litigant with his adversaries' legal fees if the suit is found to be "frivolous, unreasonable, without foundation, or in bad faith." (42 U.S.C. § 11113)

HCQIA immunity is easy to claim because the Act includes a presumption that any medical staff action was done in furtherance of quality healthcare. 42 U.S.C. § 11112 says, "A professional review action shall be presumed to have met the preceding standards . . . unless the presumption is rebutted by a preponderance of the evidence." In interpreting the fair review rules as well as the in-hospital hearing and appeal provisions of 42 U.S.C. § 11112 this court has a clear slate to write upon. The few cases decided heretofore do not address the adequacy of these procedures as practiced in the industry nor do they refer to guides issued by concerned professional associations. References to California's opt-out statute, Business and Professions Code § 809 are also sparse.

What is meant by the words "fair," "reasonable" and "adequate" as used in 42 U.S.C. § 11112 to set standards for the review and hearing process? These have not been defined by the Secretary of Health and Human Services despite Congress' invitation at § 11114. For this reason a review of the constitutional due process cases is a useful start. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1974) asks the question, "What process is due?" The answer is dictated by the nature of the rights at issue and the surrounding matrix of procedure and law found in the industry.

In *Morrissey,* this court elaborated on the due process requirements by applying the "balancing of interests" test it had first articulated in *Goldberg v. Kelly*, 397 U.S. 254 (1970) determining what procedure is due by weighing the importance of the private interest to be protected against the benefit of summary adjudication.

Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a "complexity of factors." *Hannah v. Larche,* 363 U.S. 420, 442, 80 S.Ct. 1502, 1515, 4 L.Ed.2d 1307 (1960). In determining whether a particular protection is required, three factors are generally considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirements would entail.

Matthews v. Eldridge, 424 U.S. 319, 335; 96 S.Ct. 893, 903; 47 L.Ed.2d 18 (1976).

When a physician, particularly a specialist, is expelled from a hospital staff he suffers a number of substantial losses: his referral pattern from doctors in the hospital is ended, his malpractice insurance may become more expensive or be cancelled, other hospitals may decide to expel him (as was done here using the stale cases from O'Connor Hospital) the registries at the state and federal level keep a record of the expulsion,[6] and the state medical board may initiate a procedure leading to license revocation. Obviously, the gravity of these losses to a physician facing expulsion from a hospital staff weigh toward a process which provides substantial safeguards. (See *Matthews v. Eldridge, supra.*)

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[6] Which California law now opens to the public.

UAPD is familiar with many administrative hearing mechanisms for the resolution of disputes[7] and finds that of greatest concern is the impartiality and disinterested neutrality of all decision makers. The record in this case presents undisputed evidence that there was a clear lack of neutrality at the hearing before the hospital Board of Directors, and the previous JRC hearing is flawed by Mr. Bartel's refusal to permit *voir dire* examination of the panel members on the issue of their personal as well as business relations with the accusers. Failure to have *voir dire* was criticized by this court in *Patrick v. Burget,* 486 U.S. 94 (1988).

Neither Mr. Bartel nor Mr. Simmonds conducted their hearings in a satisfactory manner.

Most noteworthy among the numerous deficiencies identified by Dr. Smith are the absence of professional cross-examination by a trained lawyer, the refusal by Mr. Bartel to allow *voir dire* and to compel production of the nurse eyewitness' first written report.[8] His failure to make a record of the JRC's deliberations in which he participated and counseled (at least his statements to them explaining the burden of proof, the value of differences of opinion, the inherent bias of

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[7] Consider the elaborate device the Writer's Guild of American uses to validate attribution of credit for movies. Three arbitrators who do not communicate with each other study the facts and report to a guild officer who reports the majority's decision. See *Marino v. Writers' Guild of America,* 992 F.2d 1480 (9th Cir. 1993). Note the right to strike names from the list of available arbitrators, 992 F.2d at 1484. This device ensures the utmost impartiality of the decision maker, unlike the procedure used in Dr. Smith's case. The upside-down burden of proof on Dr. Smith is also troubling. It is contrary to the California Statute § 809. Compare that to the United Nations' "internal justice system," where the "clear and convincing" burden of proof is on the accuser. *New York Times* March 7, 1994 page A6, and note that the Olympic Committee also puts the burden of proof on the accuser. *New York Times* February 11, 1994 page B17.

[8] Compare a prosecutor's duty of disclosure. *Brady v. Maryland,* 373 U.S. 83 (1963)

competitors, the lack of review by independent outside experts, and other issues on which he advised or should have advised) makes it impossible to conduct an intelligent review which HCQIA was designed to guarantee through 42 U.S.C. § 11112(b)(3)(C)(ii) which requires a complete record.

Mr. Simmonds failed to counsel the Directors to avoid the appearance of bias by recusing members in business or social relations with the accusers which discredited their action. He also failed to make a record of his advice during the board's deliberations in violation of 42 U.S.C. § 11112(b)(3)(C)(ii).

Huang v. Board of Directors, 220 Cal.App.3d 1286, 1294, 270 Cal.Rptr. 41, 46 (1990) established that the Directors in expelling plaintiff from the medical staff inappropriately exercised independent judgment to overturn the decision of the judicial Review Committee which retained plaintiff on the staff.

UAPD believes that when a serious hazard is presented by the charges proportionate fair procedure must be given.

While the statute calls on the Secretary of the Department of Health and Human Services to promulgate standards (42 U.S.C. § 11114), none were ever articulated by the Secretary. In the absence of such guidelines the courts are left with the task of defining these terms and evaluating whether the specific facts presented in the cases meet the statutory requirements. This is the Common Law method.

Where will the courts look for guidance?

Prior to HCQIA the UAPD created a hearing standard in its 1981 "Guidelines for Hospital Medical Staff Bylaws." The California Medical Association followed suit in 1984 by publishing its own 'Model Bylaws' for the hospital medical staff. At a 1986 meeting for health industry lawyers a section of the American Bar Association proposed some standards. In June, 1988 the American Medical Association published its guidelines for Peer Review Procedures. December 29, 1989 the Peer Review Immunity Task Group of the American Academy of Hospital Attorneys of the American Hospital Association published its lengthy guide. It contains a letter dated December 2, 1986 from acting Assistant Attorney General Charles F.

Rule, Esq. to counsel for the American Medical Association in which the immunity of HCQIA for "good faith peer review" is expressed along with the warning against "the exceptional circumstance" where the process is "a sham used . . . to restrain competition" – an "anti-trust violation." Some of that guide's suggestions are detailed in footnote 14 of the petition at page 13. In 1991 the California Legislature enacted a detailed statutory code. These materials were found "irrelevant" by the Court of Appeals (at footnote 8 of the opinion). Thus, it rejected the teaching of the great Justice Oliver Wendell Holmes who wrote, "the life of the law has not been logic; it has been experience" by rejecting the experience of the industry.

The models of UAPD, CMA, AMA, AHA, ABA and the California Legislature when taken together provide a guide to contemporary standards of fairness in the review and hearing process. "Peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care." (Calif. Bus. & Prof.Code § 809(a)(4))[9]

Even before HCQIA was enacted case law expressed standards for good faith professional review hearings. There is a good outline in *Hoberman v. Lock Haven Hospital*, 377 F.Supp. 1178 (M.D. Pa. 1974) at 1188. Also see *Hackethal v. CMA*, 138 Cal.App.3d 435, 441-444, 187 Cal.Rptr. 811 (1982).

B. The Fair Review Requirement Under HCQIA Was Not Satisfied

HCQIA requires a fair review. The legislative history of HCQIA indicates its objective to protect ethical peer review conducted under standards which decent people will respect so that "physicians receive fair and unbiased review to protect

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[9] Concerning protection of a variety of reasonable medical theories see *People v. Privitera*, 74 Cal.App.3d 936, 141 Cal.Rptr. 764, 774 (1977), hearing granted Jan. 5, 1978, 23 Cal.3d 697, 153 Cal.Rptr. 431, cert. denied, 444 U.S. 949 (1979) and *Mt. Sinai Hosp. v. Zoreh*, 271 N.Y.S. 2d 1012 (1966).

their reputation and medical practices." (1986 Code Cong. & Admin. News at 6393.)

Its sponsors made it clear that the review which is protected does not shield "improper anti-competitive behavior from redress." (H.R. Rep. No. 903, 99th Cong. reprinted in 1986 U.S. Code Cong. & Admin. News 6287, 6386.) Rep. Wyden stated: "There is one thing this bill will not do. It will not shield doctors from liability for what are truly anti-competitive business practices." 132 Cong. Rec. H9957 (daily ed. Oct. 14, 1986). Rep. Waxman stated: "The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that violate civil rights laws or actions that are really taken for anti-competitive purposes will not be protected under this bill." Id. at H9959. *Wei v. Bodner*, 127 F.R.D. 91, 99 (1989) affirms these concepts.

In accord with this standard and to ensure a fair and unbiased review, the physician should be compared to all other practitioners who do similar procedures if the first HCQIA test is to be met. Unless the worst practitioner in the hospital is the object of a privileges limitation or expulsion what meaning can there be to the test that action must be taken in the reasonable belief that it was in the furtherance of quality care? It is no answer to focus on one doctor. There are few physicians whose hospital work can withstand a super-critical review. It is only by comparison of the group that quality care can be assured. This point was inferred by Joseph A. Califano, Jr., a former Secretary of Health, Education and Welfare, in his *America's Health Care Revolution*, Random House, 1968 at page 91, and at 199 he says regarding outcome data of hospitals, "Comparable [comparison] information should be made available on doctor's performances."

Memorial Hospital v. Shadur, 664 F.2d 1058 (1981) and *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979) and *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201, 110 S.Ct. 577, 588 (1990) focus discussion on comparison of performance to justify peer review decisions. Also see *Teasdale v. Marin General Hospital*, 138 F.R.D. 691 (N.D. Cal. 1991) and *Wei v. Bodner*, 127 F.R.D. 91, 99 (D.N.J. 1989).

In *Smith* the magistrate judge ordered such comparison of the doctors doing similar work. The Court of Appeals overlooked this tool for determining if HCQIA's requirement that the interest in quality health care was met, nevertheless, the Court of Appeals relied on this specific element of the HCQIA and overlooked the procedural requirements of the act.

It is customary in the review stage for a non-competitive outside consultant to be engaged to assist in putting the review on an unbiased track. (42 U.S.C. § 11112(b)(3)(A)(iii)) Notice that most of the published cases after HCQIA make reference to an impartial outside review of the claims regarding poor medical care. Here outside review requested by Dr. Smith was refused, and only Dr. Smith's competitors testified against him. The alleged problems in the stale old O'Connor Hospital claims were found by Dr. Smith's competitors to have not been present in the 1800 cases he managed at Good Samaritan Hospital – which is why they reappointed him to the staff ten days after the L.W. death.

Once charges are formalized and a hearing is demanded, detailed "discovery" of records will establish the defense that the accused physician is not the worst doctor doing what he does. Mortality and morbidity data is routinely gathered by the hospital organizations. These records are useful in such a defense.

No process which denies its victim access to the records needed to prove his defense can meet the test of procedural fairness. Historically, discovery was provided. *Garrow v. Elizabeth General Hospital, Inc.*, 401 A.2d 533, 541-2 (N.J. 1979) requires that in matters of this kind the accused is entitled to pre-hearing receipt of "relevant and material" information in the organization's possession. Cases in accord are *Hackethal v. Loma Linda*, 91 Cal.App.3d 59, 153 Cal.Rptr. 783 (1979); and *Memorial Hospital v. Shadur*, 664 F.2d 1058 (1981) which proclaims at 1061:

> *[B]ecause evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and,*

where recognized, must be narrowly construed. (Emphasis added.)

In the *Memorial Hospital* case the court ordered production of the records of other doctors to deal with a claim that there was a lack of evenhandedness in the ways various doctors were treated.

In *Suckle v. Madison General Hospital*, 362 F.Supp. 1196 (W.D. Wis. 1973), the court found, *inter alia,* that the member subject to expulsion was entitled to comparison data out of the organization's records. Discovery is a component of the California Statute (§ 809.2) including information sought to defend the charge.

Minimum due process mandates notice, hearing, and an impartial trier of facts. Many state court opinions rest on this court's requirement of an impartial fact-finder as exemplified by *Withrow v. Larkin*, 421 U.S. 35 (1975). California cases which require *voir dire* of the Judicial Review Committee or a like fact-finder are *Appelbaum v. Barton Memorial Hosp.*, 86 Cal.App.3d 648, 657 (1980), *Lasko v. Valley Presbyterian Hosp.*, 180 Cal.App.3d 519, 528-530, 225 Cal.Rptr. 603 (1989); *Hackethal v. CMA,* 138 Cal.App.3d 435, 441, 443; and *Rosenblit v. Superior Court,* 231 Cal.App.3d 1434 (1991), and the cases cited therein. These cases reiterate that most important component of fair procedure – an impartial fact-finder.

Procedural rights found in hospital bylaws have been enforced on the basis that the bylaws themselves may create a contract between the hospital and its staff. (See 41 C.J.S., Hospitals §§ 16, 19; "Procedural Due Process Requirements in Hospital Medical Staff Decisions," 49 T.B.J. 981)

At the hearing, the physical has the right to representation by counsel and to call, examine and cross-examine witnesses. *Hutsville Memorial Hosp. v. Ernst,* 763 S.W.2d 856 (Tex.App. 1988), *Garrow, supra.* In *Smith,* a mute lawyer was approved, which is apparently contrary to the HCQIA.

The trial of an in-the-hospital staff rights case is conducted before a jury of physicians. That committee must be tested by *voir dire* examination under oath to assure that they

are not conflicted by business or personal relationships with the accusers. The same *voir dire* must be conducted of the hearing officer. Section 809.2(c) of the California Business and Professions Code provides for "a mutually acceptable arbitrator" among several options – obviously this method is most likely to be fair. Selection of Dr. Nagel's cousin as law officer of the JRC creates a negative inference on the fairness issue. Why did Dr. Smith's competitors do that if they had a good case? It is customary to engage a retired judge for that function to assure impartiality.

The active service of a lawyer is vital. HCQIA provides for it. (§ 11112(b)(3)(C)(i)) If the lawyer is forbidden to examine witnesses the hearing is not adequate. Wigmore identifies professional cross-examinations as a "vital feature" of the Anglo-American system. (5 Wigmore, *Evidence* 1367 p. 29) Further, he finds cross-examination, "beyond doubt the greatest single engine ever invented for the discovery of truth." *Op cit.* This court has expressed its belief that cross-examination is essential to the administration of justice:

> "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."

Poller v. Columbia Broadcasting System Inc., 368 U.S. 464, 473, 82 S.Ct. 468, 491, 7 L.Ed.2d 458 (1962).

By laws of some medical staffs include a burden of proof upon the physician to establish that the move against him is arbitrary, unreasonable or unsupported by the facts. This is an unfair burden. AMA, CMA and § 809.3(h) of the California Statute place the burden of proof on the accuser. HCQIA is silent on this point.

In the focus hospital the former burden on the accuser was changed to place the burden on the accused. That burden is magnified here by the accused's inability to demand an unbiased review board, and by an accuser's cousin offering legal tutelage to the board. It is also a concern that an eyewitness' first report of a key event was suppressed in the

review process and at the JRC by respondent Nagel's cousin, Mr. Bartel, the law officer.

HCQIA's § 11112(b)(3)(C)(ii). It should include all explanations of the law given to the hearing committee by the law officer. No court can assess the impartiality of the law officer's advice in the absence of a record of that advice.

The industry guides distill these cases into a practical framework. The AHA Task Group designed its report to be directly responsive to the HCQIA. This court could feel comfortable supporting that responsible organization's suggestions. It is surprising that the Court of Appeals found such guides "irrelevant." More surprising is its approval of an obviously unfair system.

CONCLUSION

UAPD's review of the facts in this case reveals a deeply flawed peer review followed by a hearing and appeal process not worthy of the name.

Monopolists protect their poor medical practices by excluding competitors like Dr. Smith from the ongoing departmental review of all cases. Refusal to perform comparison audits of common procedures according to standardized audit criteria uniformly applied is evidence of conspiracy and a threat to public health.

Strong overtones of conspiracy to monopolize use of a hospital built with public funds inspires a sense of moral outrage and contradicts the legislative intent in enacting HCQIA.

Congress designed HCQIA to eliminate abusive peer review. The system which is conceived to protect patients and the rights of healthcare professionals has in this instance apparently been used to protect and extend the monopolistic interests of Dr. Smith's competitors. The Court of Appeals misinterpreted the HCQIA and turned it into a license for unethical peer review.

Certiorari should be granted.

March 6, 1995

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(5)

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No. 94-1187

In The

Supreme Court of the United States

October Term , 1994

JOHN PHILLIP SMITH, M.D.

Petitioner,

vs.

WILLIAM B. RICKS M.D.,

et al.

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ATTORNEYS WHO APPEAR BEFORE THE UNITED STATES COURTS OF APPEALS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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17pp

QUESTIONS PRESENTED

When a merits panel believes the conduct of counsel justifies a sanction under Federal Rule of Appellate Procedure Rule 38, should the following rights obtain:

1. The right to a specific notice providing a detailed statement of the alleged offensive conduct indexed to the record for clear reference,
2. The right to a specific response including the right to present fact and expert testimony,
3. The right to a neutral review board to hear the sanction, and
4. Should the foregoing rights be accorded in all cases, or only in those when the sanction exceeds $750 or a similar sum above the ethics reporting threshold of state bar associations?

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BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

It is extremely difficult for physicians, who are subject to adverse peer review decisions, to find competent counsel who are willing to undertake representation of them in these matters. For the affected physician, an adverse peer review decision is an economically devastating event because

the physician's main source of income is either severely reduced or cut-off entirely.

Such a physician requires a forceful, effective, creative and competent advocate. The chilling effect of the decision of the United States Court of Appeals for the Ninth Circuit in the instant case, removes the incentive for counsel to undertake such representation and places the remaining assets of the physician at risk. It is a prescription for bankruptcy and economic disaster for both client and counsel.

Unlike the Sherman Anti-Trust Act, which has over one hundred years of judicial gloss, including numerous cases of this court, the Health Care Quality Improvement Act of 1986 is new, with broad language and few uniform judicial decisions. This court has yet to address many of the issues which the Act presents. Thus, if the decision in the case *sub judice* is allowed to represent the law, only those physicians who can afford to hire large and wealthy law firms will find representation. The small law firm or solo practitioners will not expose themselves to a potentially career endings sanction, either economically or by way of

discipline.

The author of this petition and supporting brief is an attorney in a two person firm that has specialized, over the last nineteen years, in representing physicians throughout the United States in staff privilege matters, including both adverse peer review decisions, failure to be given staff privileges, economic credentialling, and exclusive contract disputes. Our hourly rate, while substantial for our firm size and locale, is considerably less than that charged by large and medium sized firms that generally defend these matters on behalf of physicians and hospitals. The practical effect of the decision from which a Writ of Certiorari is sought, is to raise the cost of legal services to those physicians who can at least afford it, and to eliminate or greatly reduce competition in the field of legal services in this area of the law. It does not tilt the level of the playing field in favor of the hospital and its staff members, whose legal fees are being paid by the hospital or an insurance company. Instead, it eliminates the playing field.

FACTUAL BACKGROUND

A. THE FEE SHIFT

Amicus has evaluated the rule 56 FRCP Summary Judgment which granted immunity. We found an adequate factual response to question the entry of that order. Dr. Smith's counsel defended that motion with factual materials of a type Weisberg & Aronson characterized as commonly asserted violation of due process set against industry guidelines written by the conservative American Hospital Association's Task Group. That position appears to be reasonable, not "frivolous." It does not justify the fee shift against Dr. Smith.

Mr. Berg has protested that he never argued that the Court of Appeals should apply various state law decisions and professional guidelines *"in place of the text of the HCQIA"* as charged by the 9th Circuit's opinion (see Appendix to the petition at 21a).

As trial and appellate attorneys *amicus* is put in fear by Smith that a new and expanded application of FRAP 38 now published makes the usual practice of our profession an ultra hazardous activity to our families. We cannot function

as we did before in the normal exercise of our profession duties without fear of unfounded sanctions.

Amicus is mindful that the § 11113 fee shift against Dr. Smith was based on a *sua sponte* assessment by the District Court that he had not produced "direct evidence" of conspiracy -- an issue about which Dr. Smith got no notice, and which the 9th Circuit Court of Appeals did not reverse although it did clarify that conspiracy need not be proved by "direct evidence", but Mr. Berg's client got no benefit from the reversal on this point because the fee shift was not set aside.

Amicus is sensitized to the attorney's effort in the case to obtain for himself 9th Circuit General Order 10.9 proceedings and to have the sanction against him evaluated by a neutral forum not the panel which decided his client's case.

SUMMARY OF THE ARGUMENT

This case presents facts which go far beyond the published literature to sanction litigant and lawyer for litigating what appears to be commonplace contentions

reasonably presented. What is revealed here is the potential for fee shifting and abuse of FRAP Rule 38 which can be tempered if customary due process is required.

ARGUMENT

A. INTEREST OF THE AMICUS

Attorneys are all at risk of devastating sanctions. Fear of sanctions can be an inspiration for intellectual cowardice. Litigants who confront fee shifting statutes are in equal fear. In response to a proposed fee shifting statute (S243) this Spring, active members of the litigation section of the American Bar Association called such a statute "a regressive tax on the right to litigate." As a result of the ABA's attention the proposed statute will be modified. That protects future litigants but does nothing for those who seek to litigate fair procedure and monopolization in the health care system where about 15% of the gross domestic product is spent.

On the lawyers' behalf, Rule 11 of FRCP has recently been modified to require notice and to allow procedures to avoid sanctions by withdrawing improper pleadings. FRAP

38 has not been modified, but it should be interpreted as suggested in Cooter & Gell v Hartmax (1990) 496 US 384, 110 S.Ct. 2447, 2460:

> "[t]he issues involved in determining whether an attorney has violated Rule 11 . . . involve fact-intensive close calls."

The sanction should be reserved for "an abusive pleading or motion." Pavelic & Le Flore v Marvel Entertainment Group 493 U.S. 120,122,110 S.Ct. 456, 458 (1989). The sanctioned conduct must be done "unreasonably and vexatiously."

B. State Bar Report

California Business & Professional Code §6068(o)(3) requires Mr. Berg to report any substantial sanction under Rule 11 or FRAP 38 to his state bar. Most states have similar requirements. This burden requires an appeal which adds to the work of the appellate courts because it must be taken immediately. Union Oil, Inc. v E.F. Hutton & Co. (9th Cir. 1986) 809 F. 2d 548, 556. The chilling effect of state bar reporting has been cited in "Sanctions Under Amended

Federal Rule 11 ...." 74 *Georgetown* L.R. 1313,1352, note 249. The misfortune of such appeals is the satellite litigation required under the circumstances which doesn't help resolve the dispute between the parties. See Jensen Elec. v Moore, Caldwell, Rowland & Dodd (9th Cir. 1989) 873 F.2d 1327, 1330 (dissenting opinion by J. Schroeder).

C. Sanction Proceeding Requires Notice

FRAP 38 sanctions applied without notice raise serious due process questions. See the comment of the Committee of Federal Courts, Association of the Bar of the City of New York, "Procedural Rights of Attorneys Facing Sanctions," (1985) 40 The Record 313, 315-316 cited in *Federal Practice and Procedure* (West 1990) at volume 5A, page 32. Also see Miranda v Southern Pacific Transportation Co. (9th Cir. 1983) 710 F.2d 516, 522.

In this case there is a serious failure of "notice" and a real possibility that the Court of Appeals cited Mr. Berg for making an argument he in fact never made.

D. Punishments for Other Acts

Wright and Miller's *Federal Practice & Procedure* Vol 5A page 41 repeats the comment in 37 *Vill.L.Rev.* 575, 635 and 635 that after a finding on the merits of a case the losing attorney may find himself disadvantaged by a sanction because the court (or its staff) has a dislike for the critic of its decision.

E. Due Process

Amicus suggest that this court grant certiorari to review the FRAP Rule 38 toward the end that due process be structured according to the following suggested standards:

a. <u>The Quality of the Notice</u>

When a sanction is contemplated the attorney should get clear notification of the specific fact/law issue which the court has identified as a possible basis for a sanction. The notice should be referred to the specific document and page(s) where the offensive act appears. It's noteworthy that with all Mr. Berg's motion (which appear on the docket) no

response identified where he argued that the Court of Appeals "should apply various state law decisions and professional guidelines *in place of the text of* the HCQIA" as charged by the opinion. Compare the 9th Circuit's General order 10.9 which was *not* followed in this case.

b. Right to Respond

i. Not Within the Case

The attorney's response should not be integrated with the client's briefs -- because it imposes a conflict of interests on the attorney and results in the temptations to:

1. exculpate himself within the limited space in briefs -- depriving the client of full use of that space for the client's arguments, and

2. distort the case by emphasizing issues not

important to the client but very personal to the lawyer.

ii. Attorney Right to a Defense -- Including Expert Witnesses

A response should allow the attorney to produce expert witness statements and the type of materials used in a Rule 11 defense that this is an effort to expand the law.

c. Neutral Determination

After a sanction is proposed the issues should be referred to a neutral panel for trial to isolate the sanction grievance from case issues. The following procedures should be required:

1. Burden of proof.

A "clear and convincing" burden is suggested.

2. Finding of fact

A factually detailed finding of fact should be required if discipline is imposed including discussion of the defense of exculpatory value of unique issues in the case or the reference to common law spouses if there is an untested statute such as we find here.

CONCLUSION

The fee shift under § 11,113 of the statute was totally misapplied and worse, it was given without notice. No reported opinion is comparable.

The FRAP Rule 38 sanction in this case is not appropriate.

This court should grant certiorari to establish due process patterns for use of the fee shift and for the appellate court's sanction power.

Date: March 6, 1995 _____

LOUIS H. MARKOWITZ, ESQ.